INDEX.

PAGE

Statement 2

First: The Federal Courts have jurisdiction of this case 7

Second: The plaintiff is entitled in the Federal Court to protection against the enforcement of a confiscatory rate. It has not contracted away its right to reasonable compensation 9

The legislative policy of the State of New York embodied in the Public Service Commissions Law as expounded by its highest court is prohibitive of unalterable contract rates 13

The Public Service Commissions Law applies to rapid transit railways in New York City 28

They are within its express definitions and manifest policy 28

No interest of the City of New York in rapid transit railroads excludes them from the legislative policy of the State 32

The provisions of the Rapid Transit Act do not exclude contracts regarding the fares of rapid transit railroads from the operation of the Public Service Commissions Law 38

The language of the Rapid Transit Act in itself does not import such intention 39

PAGE

The continuation in the Rapid Transit Act after 1907 of the provisions of Sections 24 and 27 does not import an intention to exclude the fare provisions from the policy of the Public Service Commissions Law 44

The circumstance that the 1912 amendments of the Rapid Transit Act were made with particular reference to proposed Contract No. 3 does not evidence any legislative intention to authorize an unchangeable fare 52

The fare provisions in Contracts Nos. 1 and 2 do not affect the plaintiff's right to a compensatory fare 58

The fare provisions of Contracts Nos. 1 and 2 were wholly superseded by Contract No. 3 59

The fare provisions of Contracts Nos. 1 and 2 were not imposed as conditions of "constitutional consents" 65

Administrative construction of the Public Service Commissions Law as applying to rapid transit railroads 68

There is no reference to fares in the authorizing statute for the Elevated Extension Certificate 76

No decision of this Court requires or justifies a conclusion that the plaintiff has contracted away its right to a compensatory fare 77

PAGE

Defendants' theory that plaintiff was bound by a contract for a fixed fare, subject to a privilege to apply to the Commission for an increase thereof, and that a denial of such increase by the Commission raises no Federal question, is contrary to express decisions of this Court 83

Third: The action of the Transit Commission was State action enforcing the five-cent fare against the plaintiff. The plaintiff has complied with all the procedural requirements of the Public Service Commissions Law and its suit in the Federal Courts is not premature 88

Fourth: The five-cent fare yields such a low rate as to be confiscatory 108

Plaintiff is entitled to a reasonable return upon all of the property used in the public service 115

The figures upon every hypothesis show confiscation 120

(1) The total present value of all the property devoted to the public service 122

(2) The cost of all the property 125

(3) The present value of the Company-provided property 126

(4) The present value of the Company-owned property 128

(5) The Company's original investment 130

The Interlocutory Relief 132

The order appealed from should be affirmed 134

TABLE OF CASES CITED.

PAGE

Admiral Realty Co. v. City of New York, 206 N. Y. 110 ..... 53, 54, 55, 56, 59
Allison, Matter of, v. Welde, 172 N. Y. 421 45
Augusta-Aiken Ry. & Elec. Corp. v. R. R. Comm. of S. C., 281 Fed. 977 94

Banton v. Belt Line Ry. Corp., 268 U. S. 413 ..... 94, 95, 107
Binderup v. Pathe Exchange, 263 U. S. 291 7
Bluefield Waterworks and Improvement Co. v. Public Service Commission, 262 U. S. 679 121
Board of Commissioners v. New York Telephone Co., 271 U. S. 23 115
Bridge Operating Co., People ex rel., v. Public Service Commission, 153 N. Y. App. Div. 129 ..... 57, 65
Brownville, Matter of, v. Public Service Commission, 209 App. Div. 640, 240 N. Y. 586 52

Chariton, City of, Southern Iowa Electric Co. v., 255 U. S. 539 ..... 9, 26, 42, 77
City and County of Denver v. Denver Union Water Co., 246 U. S. 178 ..... 112, 114
City of New York v. Brooklyn City Railroad Co., 232 N. Y. 463 44
City of New York v. Campbell, 277 U. S. 573 65
City of Opelika v. Opelika Sewer Co., 265 U. S. 215 ..... 78, 79, 80
City of Paducah v. Paducah Railway Co., 261 U. S. 267 ..... 7, 42
Cleveland v. Cleveland City Railway Co., 194 U. S. 517 ..... 77, 78

PAGE

Cole, Matter of, 235 N. Y. 48 52
Columbus Railway etc. Co. v. Columbus, 249 U. S. 399 ..... 7, 78
Consolidated Gas Co., Willcox v., 212 U. S. 19 114
Cornell-Andrews Smelting Co. v. Boston etc. R. Corp., 209 Mass. 298 113-114

Daly, Matter of, 29 App. Div. 280 113
Darnell v. Edwards, 244 U. S. 564 117
Decatur, Town of, Georgia Ry. Co. v., 262 U. S. 432 ..... 7, 78, 79
Denney v. Pacific Telephone & Telegraph Co., 276 U. S. 97 ..... 87, 94, 107
Denver Union Water Co., City and County of Denver v., 246 U. S. 178 ..... 112, 114
Detroit v. Detroit Citizens' Railway Co., 184 U. S. 368 77
Duluth Str. Ry. Co., R. R. & Whse. Comm. of Minn. v., 273 U. S. 625 ..... 13, 83, 86, 105

Edmands v. Boston, 108 Mass. 535 114
Englewood v. Denver & South Platt Ry. Co., 248 U. S. 294 65
Evens, Matter of, v. Public Service Commission, 276 N. Y. 224 ..... 25, 49, 51, 61

Fagal, Matter of, v. Public Service Commission, 131 Misc. (N. Y. Sup. Ct.) 398 62
Fort Edward, Village of, v. Hudson Valley Ry. Co., 192 N. Y. 139 44
Freeport Water Co. v. Freeport City, 180 U. S. 587 42

Garrison, People ex rel., v. Nixon, 229 N. Y. 575 ..... 24, 49, 51, 63

PAGE

Garrison, People ex rel., v. Nixon (on Reargument), 229 N. Y. 645 ..... 49, 51, 64
Georgia Railway Co. v. Decatur, 262 U. S. 432 ..... 7, 78, 79

Henderson Water Co. v. Corporation Commission, 269 U. S. 278 ..... 81, 83, 86
Home Telephone Co. v. Los Angeles, 211 U. S. 265 ..... 41, 78
Houston v. Southwestern Bell Telephone Company, 259 U. S. 318 116
Hunter v. Pittsburgh, 207 U. S. 161 65

Interborough Rapid Transit Company, Public Service Commission v., 219 N. Y. 355 74

Kuykendall, Pacific Tel. & Tel. Co. v., 265 U. S. 196 ..... 94, 107

Los Angeles v. Los Angeles City Water Co., 177 U. S., 558 77

Mamaroneck, Village of, v. Public Service Commission, 208 App. Div. 330, 238 N. Y. 588 52
Matter of Allison v. Welde, 172 N. Y. 421 45
Matter of Brownville v. Public Service Commission, 209 App. Div. 640 (affd. without opinion 240 N. Y. 580) 52
Matter of Cole, 235 N. Y. 48 52
Matter of Daly, 29 N. Y. App. Div. 296 113
Matter of Evens v. Public Service Commission, 246 N. Y. 224 ..... 25, 49, 51, 61
Matter of Fagal v. Public Service Commission, 131 Misc. (N. Y. Sup. Ct.) 398 62
Matter of McAneny v. Board of Estimate, 232 N. Y. 377 ..... 35, 36

PAGE

Matter of McCabe v. Voorhis, 243 N. Y. 401 34

Matter of Pier 39, 62 N. Y. App. Div. 271, affd. 168 N. Y. 254 113

Matter of Public Service Commission v. Interborough Rapid Transit Company, 219 N. Y. 355 74

Matter of Quinby v. Public Service Commission, 223 N. Y. 244 20, 24

Matter of Rapid Transit R. R. Commissioners, 197 N. Y. 81 37, 116

Matter of Village of Mamaroneck v. Public Service Commission, 208 App. Div. 330, 333 (affd. without opinion 238 N. Y. 588) 52

McAneny v. Board of Estimate, 232 N. Y. 377 35

McCabe v. Voorhis, 243 N. Y. 401 34

McCardle v. Indianapolis Water Company, 272 U. S. 400 115, 123

Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 180 42

Minneapolis v. Minneapolis Street Railway Co., 215 U. S. 417 77

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650 77

New York, City of, v. Brooklyn City R. R. Co., 232 N. Y. 463 44

New York, City of, v. Campbell, 277 U. S. 573 65

New York Electric Lines v. Squire, 107 N. Y. 593 65

Nixon, People ex rel. City of New York v., 229 N. Y. 356 16, 20, 21, 24, 40, 45, 49, 51, 62, 63, 65, 80, 81

North Hempstead, Town of, v. Public Service Corporation of Long Island, 231 N. Y. 447 49, 92

PAGE

Oklahoma Gas Co. v. Russell, 261 U. S. 290 107
Opelika v. Opelika Sewer Co., 265 U. S. 215 ..... 78, 79, 80
Orinoco Realty Co. v. Bandler, 233 N. Y. 24 52
Ortega Company v. Triay, 260 U. S. 103 37

Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196 ..... 94, 107
Paducah v. Paducah Ry. Co., 261 U. S. 267 ..... 7, 42
Palatka, City of, Southern Utilities Co. v., 268 U. S. 232 ..... 78, 79, 80
Pavilion Natural Gas Co. v. Public Service Commission, 232 N. Y. 146 ..... 49, 93
People v. Budd, 117 N. Y. 1 65
People v. O'Brien, 111 N. Y. 1 20
People ex rel. Bridge Operating Co. v. Public Service Commission, 153 N. Y. App. Div. 129 ..... 57, 65
People ex rel. City of New York v. Nixon, 229 N. Y. 356 ..... 16, 20, 21, 24, 40, 45, 49, 51, 62, 63, 65, 80, 81
People ex rel. Garrison v. Nixon, 229 N. Y. 575 ..... 24, 49, 51, 63
People ex rel. Garrison v. Nixon (on Reargument), 229 N. Y. 645 ..... 49, 51, 64
People ex rel. New York Electric Lines v. Squire, 107 N. Y. 593 65
People ex rel. New York, New Haven & Hartford R. R. v. Willcox, 200 N. Y. 423 43
People ex rel. Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216 ..... 21, 58
People ex rel. West Side Street Ry. Co. v. Barnard, 110 N. Y. 548 20
Pier 39, Matter of, 62 App. Div. 271, affd. 168 N. Y. 254 113

PAGE

Prendergast v. N. Y. Tel. Co., 262 U. S. 43 106

Providence etc. Steamboat Co. v. Fall River, 187 Mass. 45 114

Public Service Commission v. Interborough Rapid Transit Co., 219 N. Y. 355 74

Public Service Commission v. Pavilion Natural Gas Co., 232 N. Y. 146 ..... 49, 93

Quinby, Matter of, v. Public Service Commission, 223 N. Y. 244 ..... 20, 24

Railroad and Warehouse Commission of Minnesota v. Duluth St. Ry., 273 U. S. 625 ..... 13, 83, 86, 105

Rapid Transit R. R. Comm., Matter of, 197 N. Y. 81 ..... 34, 116

St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352 ..... 42, 78, 80

San Antonio v. San Antonio Public Service Company, 255 U. S. 547 ..... 12, 26, 42, 77

San Diego Water Co. v. City of San Diego, 118 Cal. 556 114

Smith v. Illinois Bell Telephone Co., 270 U. S. 587 104

Smyth v. Ames, 169 U. S. 466 115

South Covington Ry. Co. v. Newport, 259 U. S. 97 7

South Glens Falls, Village of, v. Public Service Commission, 225 N. Y. 216 ..... 21, 58

Southern Iowa Electric Co. v. City of Chariton, 255 U. S. 539 ..... 9, 26, 42, 77

Southern Utilities Co. v. City of Palatka, 268 U. S. 232 ..... 78, 79, 80

Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S. 276 116

PAGE

Sun Printing & Publishing Association v. Mayor, 152 N. Y. 257 34

Superior Water, Light & Power Co. v. City of Superior, 263 U. S. 125 77

Taylor v. State, 124 N. Y. Supp. 818 113

Town of Decatur, Georgia Ry. Co. v., 262 U. S. 432 ..... 7, 78, 79

Town of North Hempstead v. Public Service Corporation of Long Island, 231 N. Y. 447 ..... 49, 92

Trenton v. New Jersey, 262 U. S. 182 65

Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496 77

Village of Fort Edward v. Hudson Valley Ry. Co., 192 N. Y. 139 44

Village of Mamaroneck v. Public Service Commission, 208 App. Div. 330, 238 N. Y. 588 52

Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216 ..... 21, 58

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1 77

Willcox v. Consolidated Gas Co., 212 U. S. 19 114

TABLE OF STATUTES CITED.

UNITED STATES

PAGE

Constitution
- Article I, Section 10 — 78
- Amendment XIV — 7

The Judicial Code
- Section 24 (28 U. S. C. §41) — 7
- Section 266 (28 U. S. C. §380) — 2, 6

NEW YORK

Constitution
- Article III, Section 18 — 20, 24, 25, 43, 46, 48, 49, 62, 65, 66
- Article VIII, Section 10 — 55
- Article X, Section 2 — 35

General Construction Law, Sec. 95 — 45

Greater New York Charter (Laws of 1897, c. 432, as amended by Laws of 1901, c. 466)
- Section 73 — 20, 46, 48, 49, 50
- Section 74 — 20, 46, 48, 49, 50
- Section 74 (as enacted by Laws of 1914, c. 467) — 48

Laws of 1894, c. 743 — 2, 76, 95

PAGE

Public Service Commissions Law
(Laws of 1907 as amended) 3, 13, 46, 57
Article 1
Sec. 2, subdiv. 5 ..... 14, 28, 29
Sec. 2, subdiv. 7 ..... 29, 33
Sec. 2, subdiv. 9 ..... 29, 33
Sec. 3 28
Sec. 5 28
Article 2 ..... 14, 28
Sec. 25 29
Sec. 26 ..... 14, 29
Sec. 28 ..... 14, 74, 94
Sec. 29 ..... 10, 90, 93, 94, 95, 102, 103
Sec. 33 ..... 15, 29
Article 3 14
Sec. 46 74
Sec. 49, subdiv. 1 ..... 15, 22, 29, 51, 75, 90, 102, 103, 113, 115
Sec. 49, subdiv. 8 ..... 30, 31
Sec. 52 74
Sec. 55 73
Sec. 56 ..... 16, 75
Sec. 57 ..... 16, 74, 75, 99
Article 4
Sec. 66, subdiv. 12 ..... 22, 24, 92, 93
Article 7
Sec. 127 31
Article VIII
Sec. 135 35
Acts amending the Public Service Commissions Law and sections affected
Laws of 1910, c. 480 ..... 30, 31
Sec. 49, subdiv. 8 ..... 30, 31
Sec. 87 31

PAGE

Public Service Commissions Law (continued)
Laws of 1910, c. 673, Sec. 127 31
Laws of 1921, c. 134 ..... 13, 35
Sec. 49, subdiv. 1 51
Sec. 49, subdiv. 8 30
Laws of 1922, c. 153, Sec. 49 51
Laws of 1923, c. 891, Sec. 49 51
Laws of 1924, c. 573, Sec. 135 35
Laws of 1926, c. 343, Secs. 430-436 13
Laws of 1928, c. 732 13

Railroad Law
(Laws of 1890, c. 565, as amended)
Sec. 37 (57) 46, 47
Sec. 93 (173) 47, 48, 49
Sec. 101 (181) 46, 47

Acts amending the Railroad Law and sections affected
Laws of 1908, c. 475, Sec. 173 (93) 48
Laws of 1910, c. 481 47
Sec. 57 (37) 47
Sec. 181 (101) 46
Laws of 1928, c. 546, Sec. 93 (173) 48

Rapid Transit Act
(Laws of 1891, c. 4, as amended)
Sec. 4 ..... 66, 67
Sec. 5 67
Sec. 6 67
Sec. 7 ..... 46, 47
Sec. 24 ..... 39, 44, 49, 50, 76
Sec. 27 ..... 39, 43, 44, 45, 47, 49, 50, 52, 67, 69, 76

Rapid Transit Act (continued)

PAGE

Sec. 30 34
Sec. 58 (63) 42

Acts amending the Rapid Transit Act and the sections affected
Laws of 1891, c. 4, Sec. 32 39
Laws of 1894, c. 752
Sec. 7 ..... 46, 47
Sec. 34 ..... 39, 45, 57, 67
Sec. 63 42
Laws of 1901, c. 466 67
Laws of 1904, c. 562 68
Laws of 1906, c. 472
Sec. 32-a 39
Sec. 34-a 39, 47
Sec. 34-d 34
Laws of 1909, c. 498
Sec. 27 ..... 39, 44, 45
Sec. 30 34
Sec. 58 ..... 42, 43
Laws of 1912, c. 226 ..... 31, 34, 36, 52, 54, 56, 57
Sec. 27 ..... 39, 44, 45, 52

State Departments Law
(Laws of 1926, c. 342, Secs. 430-436, as amended by Laws of 1928, c. 732, Secs. 15, 16) 13

PAGE

Transportation Corporations Law
(Laws of 1890, c. 566, as amended)
Sec. 61 (11), subdiv. 1 ..... 22, 46, 48, 49
Sec. 26 (66) 48
Sec. 45 (86) 47, 48

Acts amending Transportation Corporations Law and sections affected
Laws of 1915, c. 667, Sec. 26 48
Laws of 1920, c. 540, Sec. 61 48
Laws of 1923, c. 539, Sec. 61 48
Laws of 1926, c. 762
Sec. 61 (11) 48
Sec. 45 (86) 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 159.

JOHN F. GILCHRIST, LEON F. GODLEY, CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, and THE CITY OF NEW YORK,
Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY.

On Reargument.

BRIEF FOR APPELLEE INTERBOROUGH RAPID TRANSIT COMPANY

This is an appeal by the Transit Commission and The City of New York from an order of the District Court of the United States for the Southern District of New York, entered May 10, 1928, enjoining them, *pendente lite*, from limiting the plaintiff to a fare of five cents

For convenience, we shall in this brief usually refer to the parties according to their designations in the court below, the Interborough Rapid Transit Company as plaintiff and the Transit Commission and The City of New York as defendants.

for each passenger carried in the same general direction on its subway and elevated lines. The order also enjoined, on specified conditions, interference with the charging, pending final decree, of a fare of seven cents. It appointed a Special Master to take the evidence and required the plaintiff to issue rebate tickets to passengers and file a bond to safeguard their rights to refund of any amount collected in excess of five cents to which the plaintiff might be found on final hearing not to be entitled, and also to report to the Court monthly the total amount collected in excess of five cents.

The opinion of the Court below, and the order in full, are reported in 26 F. (2d) 912. They are also printed in the Reference Volume which, for the convenience of the Court, has been prepared as an Appendix to this brief (pages 1, 41).

The jurisdiction of this Court is invoked by the appellants under Section 266 of the Judicial Code [28 U. S. C., § 380].

STATEMENT.

The plaintiff, Interborough Rapid Transit Company, is a New York corporation engaged in operating subway and elevated railroads within the City of New York.

The elevated lines are the older part of the plaintiff's system. They were operated by the Manhattan Railway Company, under franchises dating from 1875, until the year 1903, when that company leased the property to the plaintiff for 999 years. As to a large part of these lines the plaintiff was limited to a fare of five cents by statutory enactment (Laws of 1894, c. 743; Appendix, p. 140).

The first subway line, which extended roughly from City Hall, Manhattan, northward to Grand Central Terminal, westward to Times Square and thence northward into the Borough of Bronx, was constructed by the Board of Rapid Transit Railroad Commissioners, on behalf of the City, and was leased to an assignor of the plaintiff. The contract providing for such construction and lease and for the equipping of the road by the contractor is known as Contract No. 1 and was executed on February 21, 1900. This contract provided for a five-cent fare with permission to collect an additional charge for additional conveniences which might be provided on one car on each train (Appendix, p. 142). On July 21, 1902, another similar contract was made, known as Contract No. 2, to provide for the construction, equipment and lease to an assignor of the plaintiff of extensions of the subway line into Brooklyn. This contract contained the same provision as to the rates of fare (Appendix, p. 143). These subway lines constructed under Contracts Nos. 1 and 2 comprised approximately 73 miles of single track, and the longest potential trip by a passenger from terminal to terminal was 17.40 miles.

In 1907 the Public Service Commissions Law was enacted, establishing a comprehensive plan for the regulation of public utilities in New York, their rates, service, properties, capitalization and accounts (Laws of 1907, c. 429). By this law, among other things, the Board of Rapid Transit Railroad Commissioners was abolished and the Public Service Commission for the First District succeeded to its powers and duties.

In order to meet the transit demands of rapidly increasing population, another contract, known as Con-

tract No. 3, was entered into on March 19, 1913, to provide for the extension of the subways. By this contract, 146.8 miles of additional single track were added to the subway system (R. vol. II, p. 818), thus trebling the original mileage. Briefly, the extensions provided two substantially parallel subway lines, by the construction of a new line from Grand Central Terminal northward into the Bronx and a new line from Times Square southward and into Brooklyn, the track from Times Square to Grand Central becoming a shuttle. The original line into Brooklyn was also greatly extended in that Borough and a new line was constructed from Grand Central Station eastward under the East River into the Borough of Queens. The longest potential trip by a passenger between the most widely separated terminals was increased to 26.78 miles.

$58,000,000 of the money for these extensions was, under the contract, to be contributed by the plaintiff and the remainder by the City of New York; all the equipment therefor was to be furnished by the plaintiff. In fact, as will later appear, the financial contributions both of the plaintiff and of the City were much larger than originally anticipated. The City leased the new railroad and equipment to the plaintiff for operation in conjunction with the existing railroads for a term from January 1, 1917, to December 31, 1965 (these dates being changed by subsequent amendment to January 1, 1919, and December 31, 1967), and the terms of the leases under Contracts Nos. 1 and 2 were adjusted to conform to the new lease term. The entire subway system, existing and to be constructed, was to be operated as a unit and for a single fare, and Article LXII of the contract provided that "the lessee shall during the term of the contract be

entitled to charge for a single fare upon the railroad and the existing railroads the sum of five cents but not more."

On March 19, 1913, the same day that Contract No. 3 was executed, the Public Service Commission granted two certificates affecting the elevated lines. The first, the Certificate for Additional Tracks, was to the Manhattan Railway Company and gave it the right to construct additional third tracks for express service on the then existing railway. The other, the Elevated Extension Certificate, was to the plaintiff and gave it the right, at its own expense, to build new elevated tracks connecting the old lines with the new subway tracks to be constructed under Contract No. 3 (which were in fact to be above ground at the points in question) in the Boroughs of the Bronx and Queens. By the terms of the latter certificate the plaintiff was also permitted to use such new subway trackage for elevated trains, thus enabling it to provide through service over both the elevated and subway lines to the points reached by those tracks.

The Certificate for Additional Tracks granted to the Manhattan Railway Company contained no fare provision, but the Elevated Extension Certificate, in Article VI thereof, provided that the plaintiff should be entitled to charge for a single fare for one continuous trip in the same general direction over the elevated lines, including the new subway tracks over which trackage rights were given to the elevated as above stated, "the sum of five (5) cents but not more."

Under stipulation of the parties (R. vol. III, p. 2020) Contracts Nos. 1, 2 and 3 and the Elevated Extension Certificate are not printed in the record, but may be

handed up to this Court on the argument. The pertinent provisions are printed in our Appendix, pages 142 to 172.

The five-cent fare having become confiscatory, the plaintiff brought this action to restrain the defendants from enforcing that rate and from interfering with the plaintiff's right to charge a seven-cent fare (Complaint, R. vol. I, pp. 3-97). After the defendants had answered, plaintiff made a motion for injunction *pendente lite* upon which voluminous affidavits were filed. The matter was heard by a statutory court, convened pursuant to the provisions of Section 266 of the Judicial Code [28 U. S. C., § 380], which granted a motion and entered the order from which this appeal is taken.

The contention of the defendants, Transit Commission and the City, was that the plaintiff was precluded by contract from charging more than a fare of five cents and that therefore its claim of confiscation raised no federal question. It was the contention of the plaintiff, upheld by the statutory court, that the enactment of the Public Service Commissions Law six years prior to the execution of Contract No. 3 (which superseded Contracts Nos. 1 and 2) and of the Elevated Extension Certificate, prevented the making of any effective contract for a rate of fare which should be unchangeable during the terms of those contracts, which were forty-nine years in the case of Contract No. 3 and eighty-five years in the case of the elevated.

This brief has been prepared without opportunity to consider the brief of the defendant, Manhattan Railway Company, presenting its individual position.

ARGUMENT.

FIRST: The Federal Courts have jurisdiction of this case.

The bill of complaint alleged that the property of the plaintiff was being taken by the State of New York without due process of law and contrary to the Fourteenth Amendment (Complaint, par. XVII, R. vol. I, p. 26; par. XIX, *id.*, p. 29; par. XXIII, *id.*, p. 34; par. LII, *id.*, p. 75; par. LXII, *id.*, p. 86; par. LXXII, *id.*, p. 93). That was sufficient to confer jurisdiction. The action arose under the Constitution of the United States (Judicial Code, Sec. 24; 28 U. S. C. § 41). Whether a cause of action so arises is to be determined from the allegations of the bill. If they distinctly disclose a substantial question of that nature, there is jurisdiction. *South Covington Ry. Co.* v. *Newport*, 259 U. S. 97.

Jurisdiction is not dependent upon the ultimate right of the plaintiff to relief. The assertion that the plaintiff has by contract deprived itself of the right to invoke the protection of the Federal Constitution has not prevented the Federal Courts from assuming jurisdiction to decide that question. See *Paducah* v. *Paducah Ry. Co.*, 261 U. S. 267; *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432; *Binderup* v. *Pathe Exchange*, 263 U. S. 291. The applicable principles were clearly stated by this Court, speaking through Mr. Justice Day, in *Columbus Ry., etc., Co.* v. *Columbus*, 249 U. S. 399, 406, as follows:

> "We are of opinion that there was jurisdiction in the District Court to entertain the bill as it pre-

sented questions arising under the Fourteenth Amendment to the Federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the Federal Constitution were presented by the bill and that the court had jurisdiction."

SECOND: The plaintiff is entitled in the Federal Court to protection against the enforcement of a confiscatory rate. It has not contracted away its right to reasonable compensation.

The basic principles controlling this case are elementary. A public utility, whose property is subject to state regulation because affected with a public interest, is protected by the Federal Constitution against confiscation under the guise of regulation. State regulation must be within the limits of fair compensation. This right is subject to but one qualification. If a utility has by contract effectively bargained away its right to a compensatory rate, it is not entitled to protection against confiscation. To have such effect, however, the contract in question must have been duly authorized by the State. Such authority must be clearly and unmistakably conferred. Such authority may not be implied where the legislative policy of the state, as expounded by its highest court, is inconsistent therewith.

These principles were summarized and applied by this Court in *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539. The unanimous opinion written by Mr. Chief Justice White said (pp. 541-542):

> "Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations [citing cases],

> and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial [citing cases].
>
> "It follows that as the rates here involved are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it."

This opinion applied to three cases brought by three utilities against the cities of Chariton, Fairfield and Muscatine, Iowa, respectively, to restrain those municipalities from enforcing maximum rates for electricity and gas, specified in ordinances which constituted their franchises, on the ground that such rates had become unremunerative and confiscatory. The cities contended that, as the ordinances upon acceptance became contracts, the utilities had bargained away their right to a compensatory rate so that there was no Federal question. The ordinance franchises had been granted pursuant to Section 725 of the Iowa Code, which read as follows:

> "Regulation of rates and service.—They shall have power to require every individual or pri-

> vate corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purpose, and to regulate and fix the rent or rates for water, gas and electric light or power * * * and these powers shall not be abridged by ordinance, resolution or contract."

This Court held that that statute did not confer power upon the municipalities to contract for permanent rates. It referred to decisions of the State Courts of Iowa construing the statute as effecting a new State policy to do away with the "contract method," through which "the rights of the public were often bartered away," and to substitute the principle of regulation "whereby it is forbidden to any existing city council to bind the city to any rate for any future time" and holding that "no one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates" (255 U. S., p. 545). This Court therefore held that, in the absence of State authority permitting a contract for an unalterable rate, the utilities involved could not have contracted away their right to be protected against the enforcement by the municipality of confiscatory rates albeit contained in a franchise which would otherwise have had the effect of a contract. This Court said (p. 546):

> "The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of

> such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the State is urged by municipal corporations whose every power depends upon the state law."

In *San Antonio* v. *San Antonio Pub. Serv. Co.*, 255 U. S. 547, decided on the same day as the *Chariton* case, the City of San Antonio had granted to a street railway company a franchise which provided that the companies "shall charge five cents fare for one continuous ride" and the company, upon denial of its application to the city for permission to increase such fare, brought suit in the Federal Court to restrain its enforcement as confiscatory. In that case this Court based its conclusion of absence of authority to make a contract for a permanent five-cent fare upon the provision of the State Constitution to the effect that:

> "No irrevocable or uncontrollable grant of special privileges or immunity shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

and its construction by the highest court of Texas as depriving the franchise of any binding effect as a contract for an inflexible fare.

See also *Railroad and Warehouse Commission of Minnesota* v. *Duluth Street Railway*, 273 U. S. 625.

The question in this case, therefore, is not whether the parties have signed a contract providing the amount of the fare. The question is whether, in view of existing applicable legislation, they had authority to make an effective contract for an inflexible fare.

The legislative policy of the State of New York as embodied in the Public Service Commissions Law as expounded by its highest court is prohibitive of unalterable contract rates.

The Public Service Commissions Law was enacted in 1907.* It initiated a wholly new State policy of continuous regulation, through commissions, of the rates and service of a great variety of public utilities. It applied as originally enacted to railroads, street railroads and common carriers (the latter term including also express companies, car companies, sleeping car companies, freight companies and freight line companies) and gas and electric corporations; telegraph and telephone corporations were added by amendment in 1910, and steam heating, baggage, transfer, stockyards and other utilities by subsequent amendments.

* On its enactment and until 1921, this statute was known as the Public Service Commissions Law. Up to that time the statute divided the State into two public service districts, the first district comprising the City of New York, and the second district the remainder of the State, and each having a public service commission. In 1921 (L. 1921, c. 134), the jurisdiction of the Public Service Commission for the First District as to railroads and street railroads was transferred to a Transit Commission, and there was but one Public Service Commission. The title of the law was then changed to Public Service Commission Law. The Transit Commission is now the Metropolitan Division of the Department of Public Service of the State of New York, and the body which is now called the Public Service Commission is the State Division of that department (State Department Law, L. 1926, c. 343, Secs. 430-436; L. 1928, c. 732).

By subdivision 5 of Section 2 of the Act, the term "street railroads" was defined as including "every railroad by whatsoever power operated * * * being mainly upon, along, above or below any street * * *."

Articles 2 and 3 contained provisions relating to, and the powers of the commissions in respect to, railroads, street railroads and common carriers, among them the following (the references and quotations being as of March 19, 1913).

Section 26 provided:

> "Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited."

Section 28 required the filing, as public documents, of schedules of rates, fares and charges. Section 29 provided that no change should be made in any such rate, fare or charge except after prescribed notice to the Commission and the filing of new schedules. Sec-

tion 33 prohibited the charging of "a greater or less or different compensation" than the rates, fares and charges so filed.

Section 49 provided:

> "1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

Section 56 provided for forfeitures and penalties for violation of the Public Service Commissions Law and for failure to obey proper orders of the Commission, and Section 57 for summary proceedings to be brought by the Commission to enforce its orders and prevent violations.

The leading case in the Court of Appeals of New York declaring the effect of these provisions and the new legislative policy embodied therein is *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356. In that case receivers of the Manhattan & Queens Traction Company, which had succeeded to the franchise of the South Shore Traction Company, made application to the Public Service Commission for authority to charge a higher fare on the ground that the existing maximum of five cents was unjust and inadequate. That maximum was prescribed in a contract with the City of New York, made in 1912. A writ of prohibition directed to the Commission was issued by the Supreme Court on the application of the City of New York and on its contention that the contract validly imposed the five-cent fare. The order granting this writ was affirmed by the Appellate Division, which said (180 App. Div. 612, 613-614):

> "The municipal consent was granted for the city by the board of estimate and apportionment on the 15th day of July, 1912, and approved by the mayor July 16, 1912, and was embodied in a *formal contract* between the city and the South Shore Traction Corporation—the assignor of the company represented by the receivers—bearing date October 29, 1912. The *contract* provided that the consent of the city was given subject to the conditions and provisions therein set

> forth. * * *; and by subdivision 'fifth' of the same section, it was provided that the consent of the city was granted upon the condition that the company should not charge any passenger a greater rate of fare than five cents for one continuous ride from any point on the railway, * * *."[1]

The Appellate Division therefore held that the Public Service Commission was "wholly without jurisdiction over the subject-matter of the application.

The Court of Appeals reversed the Appellate Division and said by Judge Cardozo (pp. 358-359):

> "At the date of this franchise, the public service commission was empowered by statute to increase 'the maximum rates, fares, or charges chargeable by any * * * street railroad corporation' when found to be inadequate to yield a fair return (section 49, Public Service Commissions Law; Consol. Laws, chap. 48). That power came to the commission through the amendment of the Public Service Commissions Law in June, 1911 (L. 1911, chap. 546; *People ex rel. Ulster & Del. R. R. Co.* v. *Public Service Commission*, 171 App. Div. 607; 218 N. Y. 643), if it did not already exist under the law as first enacted in 1907 (L. 1907, chap. 429, sec. 49. Cf. the statutes construed in *People ex rel. Vil. of South Glens Falls* v. *Pub. Service Comm.*, 225 N. Y. 216, 223; *People ex rel. N. Y. Steam Co.* v. *Straus*, 186 App. Div. 787, 793; 226 N. Y. 704, and *Arlington Board of Survey* v. *Bay State Street Ry. Co.*, 224 Mass. 463). Contracts fixing rates, if made before the enactment of these statutes, were subject at the utmost to the possi-

[1] All italics in this brief are ours, unless otherwise noted.

bility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a reality. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had already done, drawing upon sources of energy, reserves of power, till then latent and potential, and manifesting its will in law. A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at nought. The state through its delegate, the commission, would lower the charges if too high. It would raise them if too low (*People ex rel. N. Y. Steam Co.* v. *Straus, supra; Arlington Board of Survey* v. *Bay State Street Ry. Co., supra; Postal Tel.-Cable Co.* v. *Associated Press*, 228 N. Y. 370, 375; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*, 248 U. S. 372). Rate-making was to be no longer an affair of predominantly private interest, in which the state would interfere without system and with spasmodic and intermittent action. A superintending agency of government had taken the matter in hand."

And again at pages 360-361 the Court of Appeals said:

"Here the statute was in existence when the municipal consent was given. Recognition in such circumstances of the power of the commission involves no interference with a grant already executed. No condition is annulled; no

defeasance is abrogated; no obligation of contract is nullified or impaired. The obligation of a contract is determined by the law in force when it is made (*McCracken* v. *Hayward*, 2 How. [U. S.] 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed (*Louisville & Nash. R. R. Co.* v. *Mottley, supra; Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp., supra; Producers' Transp. Co.* v. *R. R. Comm., supra*). That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force (*Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Denny* v. *Bennett*, 128 U. S. 489; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 446). Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to 'transform a consent that was qualified into one that is absolute' (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation. Nothing in the *Quinby* case commits us to another doctrine."

The authority of the City of New York to make the contract involved in the *Nixon* case was derived from the New York State Constitution, Article III, Section 18, providing in its material portion as follows:

> "But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained."

Under the decisions of the New York Court of Appeals prior to the enactment of the Public Service Commissions Law, municipalities had been held authorized to impose, as conditions of their so-called "constitutional consents," restrictions as to fares to be charged to the extent permitted by applicable legislation. In the absence of restrictive legislation, they had been held to have the power to impose a binding condition as to the rate of fare. *People ex rel. West Side Street Ry. Co. v. Barnard*, 110 N. Y. 548, 553; *People v. O'Brien*, 111 N. Y. 1.

The statutory authority of the City to grant the franchise and impose as a condition the stipulation as to fare was contained in Sections 73 and 74 of the Greater New York Charter (Laws 1897, c. 432), the latter of which provided for a "contract with all the terms and conditions, including the provisions as to rates, fares and charges."

Matter of Quinby v. Public Service Commission, 223 N. Y. 244, referred to in the last sentence of the above quoted passage from the *Nixon* case, had held that a fare provision inserted as a condition of a constitutional con-

sent in a franchise granted prior to the passage of the Public Service Commissions Law was not affected by the provisions of the law subsequently passed in 1907. This decision was explained in the *Nixon* case (229 N. Y. pp. 359-360) as based, not upon any "constitutional restraint" upon the power of the Legislature over even such a pre-existing contract, but purely upon statutory interpretation. The Court said (p. 359):

> "* * * We held, however, in *Matter of Quinby* (223 N. Y. 244; 227 N. Y. 601, explained and limited in *People ex rel. South Glens Falls* v. *Public Service Comm., supra*), and again in *Matter of International Ry. Co.* v. *Public Service Comm.* (226 N. Y. 474), that the legislature did not intend to clothe the commission with the power to release the obligation of then existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise."

This construction of the Public Service Commissions Law as not affecting the obligation of prior existing contracts, was, however, limited to contracts made pursuant to "constitutional consents." This is manifest from the case of *People ex rel. Village of South Glens Falls* v. *Public Service Commission*, 225 N. Y. 216, which had squarely involved the question of a franchise contract made prior to the enactment of the Public Service Commissions Law, but not under a constitutional consent, and which the Court of Appeals in the above quoted paragraph from the *Nixon* case referred to as explaining and limiting the *Quinby* case. That was an appeal from an order which reversed on certiorari a determination of the Public Service Commission authorizing an

increase of rates under Section 66 of the Public Service Commissions Law, which contained substantially the same provisions regarding the regulation of the rates of gas and electric companies as did Section 49 with respect to the rates of railroads and street railroads. The company in 1900 had been granted a franchise to use the streets of the village for its pipes for fifty years, for which the village exacted as consideration that the company should charge for gas a sum not larger than the maximum therein fixed. The power of the local authorities to contract was derived from the New York Transportation Corporations Law, Sec. 61, subd. 1, now Sec. 11, subd. 1. The facts showing that with the passage of years this rate had become unreasonably low were clear, but the Appellate Division had set aside the Public Service Commission's increase on the ground that the franchise constituted a contract which could not be abrogated by the gas company or the Public Service Commission. The Court of Appeals reversed this decision. The Court, by Judge Crane, thus expressed the applicable principles of law (pp. 221-223):

> "But the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare. Reason dictates that such arrangements could not be contracts falling within the constitutional provisions against abrogation. Assume that a village has granted to a corporation a franchise to use its streets for gas or electricity under a rate which is reasonable for the conditions as they exist at the time, but which, as the village

has grown into a city, is exorbitant and excessively profitable to the corporation. Reduction in the rate by the legislature so as to be reasonable to the consumer and profitable to the corporation would seem to be well within the police power of the legislature. Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. The terms and conditions upon which a village may permit a public service corporation to use its streets may prove unsafe, unhealthy and extremely improper, as the community expands and grows. New inventions and contrivances in common use may necessitate a change. To say that such conditions were beyond the legislative control would bind the public to the facilities of our forefathers and be contrary to the numerous statutes which have been passed and recognized as legal requiring service corporations to change their plants. * * *

"The same reasoning applies to rates of service. Change in conditions, in equipment, in the process of manufacture or in the manufactory itself to meet modern conditions costs money, and yet this cost should not be considered if the health and safety of the public demand a change. A reasonable increase in rates in order to provide the money for these changed conditions is as much a benefit to the public as a reduction in rates when the charge is excessive. It is a bad political economist who thinks the public is always served best by that which is cheap."

The Court of Appeals then passed to the question whether the Legislature, having clearly the power to regulate the charges of the company, had conferred this power upon the Public Service Commission. The

Court held that it had, quoting Section 66 of the Public Service Commissions Law and expressly distinguishing *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244, as involving a consent of local authorities under Section 18 of Article III of the Constitution. It was the view of the dissenting judges in the *South Glens Falls* case that the result of the *Quinby* case was that no franchise contract entered into prior to 1907 was affected by the enactment of the Public Service Commissions Law in that year. Thus the decision of the majority, holding that the gas franchise contract there involved did not survive the Public Service Commissions Law and distinguishing the *Quinby* case on the ground that it involved a constitutional consent, clearly means that the only contracts which after the year 1907 were not subject to change under the Public Service Commissions Law were those made as conditions to constitutional consents between the adoption of the constitutional provision in 1875 and the passage of the Public Service Commissions Law in 1907.

On the same day that the *Nixon* case was decided, the Court of Appeals, in a *per curiam* opinion in *People ex rel. Garrison* v. *Nixon*, 229 N. Y. 575, summarized the effect of all of its prior decisions regarding street railroad contracts, to which alone the constitutional consents related, as follows (p. 576):

> "We think that the following classes of franchises fall outside the scope of our decisions in *Matter of Application of the City of Niagara Falls* v. *Public Service Commission of the State of New York for the Second District* and the *International Railway Company* (decided herewith) (229 N. Y. 333); *Matter of Quinby* v. *Public Service Commission* (223 N. Y. 244):

1. All franchises granted directly by the legislature.

2. All franchises granted by municipal authorities prior to January 1, 1875. Such franchises are subject to proper legislative regulation.

3. All franchises granted by municipal authorities subsequent to the passage of the Public Service Commissions Law on July 1, 1907."

And the Court then enumerated as a fourth subdivision certain particular franchises granted between 1875 and 1907 which were involved in that particular litigation.

This state of the law is recognized in the most recent decision of the Court of Appeals. *Matter of Ezens* v. *Public Service Commission*, 246 N. Y. 224.

The result of all of the decisions of the New York Court of Appeals under the Public Service Commissions Law is that no statute authorizing the making of a contract between a municipality and a utility as to a rate or fare may be deemed after the passage of that law to authorize a contract for an unchangeable rate or fare, and therefore that no such contract made after that law may be deemed effectively to provide for an unchangeable rate or fare; and that the provisions of the Act providing [illegible] regulation of rates and fares applied also [illegible] prescribed in contracts made prior to the passage of the law, except in the single case of contracts made as conditions of consents of municipalities under Section 18 of Article III of the State Constitution between 1875 and 1907.

No New York case has ever held that any rate or fare prescribed in any contract made prior to the Public Serv-

ice Commissions Law was not thereafter subject to regulation except where the contract was made in connection with a constitutional consent.

And no New York case has ever held that any such contract made after the passage of the Public Service Commissions Law could effectively provide for an unchangeable rate or fare.

Thus the effect of the Public Service Commissions Law, as interpreted by the highest court of New York, brings the contracts here involved squarely within the decisions of this Court in *Southern Iowa Electric Co.* v. *Charlton*, 255 U. S. 539, and *San Antonio* v. *San Antonio Public Service Commission*, 255 U. S. 547, already referred to. The attempt of the defendant Transit Commission (Brief, pp. 136-141) to distinguish these decisions on the ground that the contracts there involved were "expressly prohibited" cannot succeed. The question is whether the Legislature has authorized a contract for a permanent fare. Such a contract was at least as clearly prohibited by the Public Service Commissions Law as were the contracts involved in the *Charlton* and *San Antonio* cases. By that law all rates were to be just and reasonable and were to be fixed by the Commission by orders made in the exercise of its regulatory power; the lawful rates were to be filed, and the charging of "a greater or less or different compensation" than such filed rates was prohibited. Rates which were unreasonable because not compensatory were just as unlawful as those which were unreasonable because excessive.

Indeed the present Corporation Counsel of the City of New York, who signs the City's brief herein, so advised the Board of Estimate and Apportionment of the

City of New York in a formal opinion rendered September 16, 1924 (Printed Minutes, pp. 6650, 6653, 6654), with respect to a proposed contract with the Brooklyn Edison Company. He then advised the City:

> "The decisions of our Courts are to the effect that the rate and fare provisions found in the Public Service Commission Law are imported into all franchise contracts made since July 1, 1907 (*The People of the State of New York on the relation of Lindley M. Garrison, as Receiver, v. Lewis Nixon, constituting, etc., and The City of New York*, 229 N. Y. 575; *People ex rel. City of New York, Respdt., v. Lewis Nixon, constituting, etc., and William R. Begg and Arthur C. Hume, as Receivers, etc.*, 229 N. Y. 356; *North Hempstead v. P. S. Corp. of L. I.*, 231 N. Y. 447; *Pub. Serv. Com. v. Pavilion Nat. Gas Co.*, 232 N. Y. 146), so that even in the absence of section 3 of the contract of December 28, 1909, hereinbefore quoted, the rates of the Brooklyn Edison Company, Inc., would be subject to modification up or down by the Commission. * * *
>
> "I am therefore of opinion that an agreement such as that referred to in your communication of June 14, 1924, by the Brooklyn Edison Company, Inc., not to increase its rates for electricity within the territory covered by the franchise of December 28, 1909, above those named in said franchise, would be *in violation* of the above quoted sections of the Public Service Commission law aimed against discrimination and undue preference, and would also be an attempt to oust the Public Service Commission of jurisdiction to regulate the rates of the Brooklyn Edison Company, Inc., and would therefore be *void and unenforceable* as against an exercise of the jurisdiction of the Public Service Commission."

The Public Service Commissions Law applies to rapid transit railroads in New York City.

The defendants, however, contend that the State policy of regulation of the rates and service of public utilities which was embodied in the Public Service Commissions Law does not apply to rapid transit railroads in the City of New York. Their contention is that the construction and operation of such railroads is governed by the Rapid Transit Act and that its provisions manifest a legislative purpose that the fares to be charged by the plaintiff should be fixed by contract rather than regulated by the Commission under the principles of a reasonable return upon the property used in public service.

THEY ARE WITHIN ITS EXPRESS DEFINITIONS AND MANIFEST POLICY.

Clearly, rapid transit railroads are within the express terms of the Public Service Commissions Law. Article 2 thereof relates to "railroads, street railroads and common carriers." Subdivision 5 of Section 2 defines the term "street railroad" as "every railroad by whatsoever power operated * * * being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town." By Section 3 public service districts were established and it was provided that the first district should include the Counties of New York, Kings, Queens and Richmond, Bronx County being added when later created. These counties embrace the City of New York alone. Section 5 prescribed the "jurisdiction, supervision, powers and duties of the Public Service Commission in the First District," as extending to "railroads and street railroads lying ex-

clusively within that district, and to the persons or corporations owning, leasing, operating or controlling the same." The words "above or below any street" in Section 2, therefore, manifestly describe the subway and elevated lines in the City of New York. Moreover, they can describe nothing else, for it is a matter of common knowledge that there were not then and are not now street railroads "above or below any street" in any other city of the State.

Section 25 of Article 2, relating to railroads, street railroads and common carriers, provides:

> "The provisions of this article shall apply to the transportation of passengers or property from one point to another within the State of New York, and to any common carrier performing such service."

Subdivision 9 of Section 2 defines the term "common carrier" as including "street railroad corporations."

The provisions, therefore, of Sections 26, 33 and 49 above quoted that "all charges * * * shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter," prohibiting the charging of any "greater or less or different compensation" than the reasonable rates to be shown in its filed schedules, and requiring the Public Service Commission, whenever rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential * * *, or that the *maximum* rates, fares or charges, *chargeable* by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered," to "determine the just

and reasonable rates," apply to this plaintiff and the subway and elevated lines operated by it as clearly as statutory language can make them.

Indeed, in 1910, three years before the execution of Contract No. 3, Section 49 of the Public Service Commissions Law was amended by inserting a new subdivision containing an express reference to rapid transit railroads as follows:

> "8. No passenger joint rate, fare, charge, through route or transfer shall be required between any rapid transit railroad and any other rapid transit railroad or any railroad operated as a street surface railroad, nor between a street surface railroad and any railroad operated wholly by steam, or any railroad operated a distance of over fifty miles partly by steam and partly by electricity."

Of course, if the regulatory powers of the Commission over fares had no application to the fares of rapid transit railroads, it would have been unnecessary to make the above express exception to such regulatory power. And the Commission's power to order joint rates on rapid transit railroads was restored by Laws of 1921, c. 134, by prefixing to the above-quoted subdivision the words "Except as may be provided by the Transit Commission," thereby indicating that rapid transit railroads are within the purview of the Public Service Commission Law.

The suggestion of the Transit Commission (Brief, p. 22) and the City (Brief, pp. 98-99) that the 1929 amendments to the Rapid Transit Act, and especially the repeal clause thereof, repealed or affected the regulatory provisions of the Public Service Commissions

Law affecting rapid transit railroads, is utterly without merit. There was no inconsistency between the Rapid Transit Act and the Public Service Commissions Law. Repeals by implication are not favored. Moreover, every argument advanced by the defendants with respect to the effect of that repeal clause applies with equal force *e converso* to the repeal clause of the 1910 amendments to the Public Service Commissions Law. By Chapter 480 of the Laws of 1910 the Public Service Commissions Law was generally amended and re-enacted, changes being made in many sections. The amendment to Section 49 substantially enlarged the Commission's regulatory powers, and there was inserted therein the subdivision above quoted applying to rapid transit railroads. Section 87 (renumbered as Section 127 by Chapter 673 of the Laws of 1910) contained a repealer of "all other acts and parts of acts otherwise in conflict with this act." The 1912 amendments to the Rapid Transit Act contained no repeal clause.

Certainly, every intendment must be against imputing to the Legislature an intention to exclude rapid transit railroads from the policy of the Public Service Commissions Law. That policy was that the regulation of the rates and service of public utilities should be responsive to changing conditions. It was the negation of the method of attempting to deal by contract with the operations of a public utility for fifty years in the future. As to none of the utilities to which that law applied was the new public policy of continuously just and reasonable rates and safe, adequate and modern service more clearly desirable than in the case of rapid transit railroads in the City of New York.

Contract No. 3 was made in 1913, to be operative until 1967, more than half a century. In the half century that had preceded 1913, the population of the City of New York had multiplied many fold, and its transportation facilities had progressed from horse cars on surface roads to elevated transportation with steam as the motive power, and finally to electrically propelled street cars and elevated and subway lines. Even during the first fifteen years since Contract No. 3 was executed, there has occurred the revolution of economic conditions attendant upon the decreased purchasing power of the dollar following the World War, so that wages and materials are 100 per cent. and the general level of commodity prices 70 per cent. higher than when the contract was made (R. vol. I, p. 54; vol. II, pp. 815-816; vol. II, p. 1089). What changes of conditions may occur in the nearly forty years which remain of the term of Contract No. 3,—how the City of New York may be enlarged through the addition of localities naturally tributary to it and what developments there may be in the needs and accepted methods of transportation,—may not even now be forecast. Certainly in 1913 they could not be even vaguely imagined. An intention to exempt rapid transit railroads from the policy of continuous regulation which became the accepted method as applied to all other utilities, is not lightly to be imputed to the Legislature.

NO INTEREST OF THE CITY OF NEW YORK IN RAPID TRANSIT RAILROADS EXCLUDES THEM FROM THE LEGISLATIVE POLICY OF THE STATE.

Nor are rapid transit railroads to be deemed excluded from the application of the Public Service Commissions

Law by reason of any interest of the City of New York therein. The argument of the City that it is to be regarded as the operator of the subway and elevated lines (Brief, pp. 63-72), and that its railroads could not be subjected to regulation by a State commission because to do so would "frustrate" a great city purpose (pp. 73-84), is demonstrably unsound and contrary to the express decisions of the Court of Appeals of New York.

The City argues that it could operate the subways itself. But it has not chosen to do so. It has leased them to the plaintiff. Next, it is asserted that the original lessees, the plaintiff's assignors under Contracts Nos. 1 and 2, were not railroad corporations, and that the plaintiff stands in their shoes as to the lines covered by those contracts. But if those contractors had operated the lines, they would certainly have been embraced within the definitions contained in the Public Service Commissions Law of the term "street railroad corporation," as including "every corporation, company, association, joint stock association, partnership and person" operating a street railroad (Sec. 2, subdiv. 7), and of the term "common carrier" as including among other things "street railroad corporations" and "every corporation, company, association, joint stock association, partnership and person * * * owning, operating or managing any such agency" (Sec. 2, subdiv. 9). But the lines are in fact being operated by the plaintiff, which was incorporated under the Railroad Law, and is certainly both a "street railroad corporation" and a "common carrier." The traveling public are the "customers" of the plaintiff, not of the City.

But, the City argues, rapid transit is a city purpose, and no legislation which may frustrate that purpose is

valid. While rapid transit may be a city purpose, within the meaning of the constitutional prohibition against the incurring of indebtedness "except for county, city, town or village purposes" (*Sun Printing & Publishing Association* v. *Mayor*, 152 N. Y. 257), "it is, however, subject to regulation at all times by the power of the State except as the State has divested itself of such power" (*Matter of McCabe* v. *Voorhis*, 243 N. Y. 401, 414).

Certainly the particular purpose which the City's brief alleges would here be frustrated—the "policy of not operating for profit and of apportioning the costs of rapid transit between two classes, one which rides and the other owning property, greatly enhanced in value by being made quickly accessible; the cost to the former being met by tolls and the latter by taxes" (Brief, p. 79; see also p. 154)—is prohibited by express statutory enactment.

The first provision for municipal operation of rapid transit railroads was inserted in the Rapid Transit Act by Laws of 1900, c. 472, Sec. 34-d, providing that in the event of municipal operation the rates of fare should be adjusted, fixed and readjusted always with a view of securing sufficient receipts therefrom, when added to the net incidental revenues, to provide for the operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for construction and equipment within a reasonable period, "*without recourse to taxation.*" This identical language was retained in the revision in Laws of 1909, c. 498, when Section 34-d became Section 30; and no amendment to this section was made in 1912 or thereafter. And as to the municipal operation of the new

subway lines now under construction, the Legislature has provided in Section 135 of the Public Service Commissions Law (added by Laws 1924, c. 573) that while the rate of fare shall be five cents for an initial period not to exceed three years, the Board of Transportation shall thereafter "adjust, fix and readjust" that rate if it be found insufficient to pay operating expenses, expenses of maintenance and repairs, contributions for depreciation and obsolescence, interest payable on any city debt incurred on account of the railroads, and contributions to a sinking fund to amortize and retire such debt.

The City's reliance on Section 2 of Article X of the New York State Constitution, quoted at page 80 of its brief, is wholly misplaced. That section was directly involved in *Matter of McAneny* v. *Board of Estimate*, 232 N. Y. 377, which arose under the 1921 amendments of the Public Service Commissions Law, and particularly the provision thereof which imposed upon the Board of Estimate and Apportionment of the City of New York a mandatory duty to appropriate all sums of money which the Commission might requisition to enable it to perform the duties imposed on it by that law. The Board of Estimate having refused to make such an appropriation, the Transit Commission applied for mandamus. The Board of Estimate attacked the validity of the provisions of the Public Service Commission Law in question as constituting interference with city functions. Among other things, it relied on Section 2 of Article X of the Constitution. The City's contention was that the Transit Commissioners were City officers, but the Court of Appeals said (p. 390): "The assertion is unfounded and has, in effect, been so

determined by this Court. They are not city officers." The Court of Appeals pointed out (pp. 386-387) that the Legislature has complete control over the finances of the City, that the Board of Estimate itself was established "as an agent of the State," and that a large proportion of the City's budget has always been composed of "mandatory appropriations."

The Court of Appeals further held (p. 393), directly contrary to the basic contention advanced in the City's brief, as follows:

> "Rapid transit for the city of New York has, for many years, been a matter of public interest, affecting not only the people of that city, but of the whole state. It has been generally regarded as a state affair. The history of legislation on the subject shows it. * * * All of the legislation bearing on the subject has for many years recognized that a duty rested upon the legislature to provide for rapid transit, such duty to be performed by itself or by an agent designated for the purpose, a function which the state, in its sovereign capacity, had a right to exercise irrespective of the city authorities, since it concerned the whole state just as much as the maintenance of highways or the management of other public utilities."

The City's brief intimates that the future maintenance of an unchangeable five cent fare was the essential consideration which induced the lease and the City's investment. Even if this were so it would not be material. The Public Service Commissions Law had been in effect for six years when Contract No. 3 was made and was, in the language of the Court of Appeals, "notice to municipalities that franchises thereafter granted

must be coupled with no conditions inconsistent with the jurisdiction thus conferred" on the Public Service Commission. In making Contract No. 3 the City of New York was acting not in any governmental, but purely in a proprietary, capacity. The City, in dealing with the subway, "is a railroad corporation so far as the construction, operation and leasing thereof is concerned." *Matter of Rapid Transit R. R. Commissioners*, 197 N. Y. 81, 96. This Court has expressly held that, even where a five cent fare was indisputably the chief moving consideration of a contract, it was subject to later regulation either up or down. *Ortega Company v. Triay*, 200 U. S. 103.

But Contract No. 3 does not support the City's contention that the five-cent fare was the primary inducement. The emphasis is upon the operation of the lines already built, in conjunction with those to be built, as a unified system "for a *single* fare," rather than for a fare of any particular number of cents. The recital of the consideration in Article XLIX containing the rental provisions is: "In consideration of the operation of the Railroad and the Existing Railroads, in conjunction with each other for a single fare and of the contribution of the lessee to or toward the cost of construction of the Railroad, as aforesaid, and in further consideration of the covenants and agreements by the lessee to modify the term or terms of Contract No. 1 or Contract No. 2 upon the commencement of operations of the portions of the Railroads specified in Article XLVII, the gross receipts shall be divided" as thereafter set forth. And in Article LXX it is recited that:

> "*The principal object of the City in making this contract is to secure for the public con-*

> *venience an adequate, comfortable and rapid system of passenger transportation* in the portions of New York which will be served by the Railroad and Existing Railroads. By the foregoing provisions of the Lease the Lessee has covenanted, among other things, to operate the Railroad and the Existing Railroads carefully and skillfully, according to the highest standards of railway operation, to supply adequate Equipment; to run trains so as to furnish adequate service; to use the best safety devices; to keep the Railroad, the Equipment, the Existing Railroads and the Existing Equipment, clean, dry, well lighted, heated and ventilated; and to do other things, as hereinbefore set forth, for the convenience and accommodation of the public. *These covenants on the part of the Lessee are among the principal* moving consideration to the City in making this contract, and any breach thereof will entitle the City to the remedies provided in this contract."

No one of these "principal moving considerations" has anything to do with the amount of the fare.

The provisions of the Rapid Transit Act do not exclude contracts regarding the fares of rapid transit railroads from the operation of the Public Service Commissions Law.

The defendants, however, contend that the Rapid Transit Act expressly authorized the making of a contract with reference to fares and that the continuation of this provision in that statute after the enactment of the Public Service Commissions Law indicates a legislative intention that contracts made pursuant to it should not be subject to regulation.

THE LANGUAGE OF THE RAPID TRANSIT ACT IN ITSELF DOES NOT IMPORT SUCH INTENTION.

The sections of the Rapid Transit Act which are relied on are Sections 24 and 27. Section 24 is the statute under which the Elevated Extension Certificate was issued. Section 27 is the statute under which Subway Contract No. 3 was executed.

Section 24 (formerly Section 32-a) was added to the Rapid Transit Act by Laws of 1906, Chapter 472, and the language thereof which defendants assert authorized the making of a contract as to the fares to be charged on the elevated railroad lines, is the following, contained in subdivision 1:

> "* * * and the Commission shall with like approval, [that is, the approval of the Board of Estimate and Apportionment] fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper * * *."

This same language had been contained in the act since Laws of 1891, c. 4, Sec. 32.

The section which at the time of the making of Contract No. 3 was Section 27, originated in the Laws of 1894, Chapter 752, and was thereby numbered Section 34 of the Rapid Transit Act. Its numbering was subsequently changed by the amendments of 1906 to Section 34a and by the amendments of 1909 to Section 27, which number was retained in the amendments of 1912. It provides for the making of a contract for the equipment and operation of a railroad and that such contract

> "shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said Commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said Commission with like approval."

The language above quoted has not been changed by any amendment since its enactment in 1894.

It is not enough that these sections of the Rapid Transit Act authorized the insertion of a fare provision in a contract. The question is whether, at least after 1907, they authorized a contract for a permanent fare. The Legislature exercised its police power to alter the public policy of the State with respect to the regulation of fares and character of service by the passage of the Public Service Commissions Law. That law by its express terms applied to rapid transit railroads.

It was still competent after 1907 for a municipality in granting a franchise to, or making a contract with, a utility, to insert a provision regarding the fare. But such a contract, after 1907, could not effectively establish a permanent fare. It does not detract from the usefulness of a contract as a method of fixing an initial fare, which may persist until through changing conditions it becomes either too low or too high, to deny to it an effect which would bar both the utility and the municipality from then insisting that it has ceased to be reasonable.

The question is not of the right to make a contract, but of what the contract means when made. As the Court of Appeals said in the *Niron* case, 229 N. Y., p. 361, "Statutes [referring to the provisions of the Public

Service Commissions Law] then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the Commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred."

The decisions of this Court recognize that, even in the absence of an actual existing statute such as the Public Service Commissions Law embodying the public policy of continuous supervision of public utilities, every doubt is to be resolved against the authority of a municipality to contract for an unchangeable rate. In *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, this Court said:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

See, to the same effect, *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 599; *Milwaukee Electric Ry. & Light Co.* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, 180; *Southern Iowa Electric Co.* v. *City of Chariton*, 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547, 558; *City of Paducah* v. *Paducah Railway Co.*, 261 U. S. 267, 272; *St. Cloud Public Service Co.* v. *City of St. Cloud*, 265 U. S. 352, 356.

Tested by this standard, the provisions of the Rapid Transit Act upon which defendants rely are utterly insufficient. It does not "clearly and unmistakably" appear that the Legislature intended to authorize the making of a contract providing for a rate of fare and standard of service which should be unchangeable for the whole life of the contract, more than fifty years in the case of the subways and eighty-five years in the case of the elevated. Preliminarily it may well be doubted whether such was in the contemplation of the Legislature even at the time the law was first enacted and whether a solution so obviously not "suited to the public interests" as such an inflexible fare was ever intended to be authorized by the language that the contract might contain terms and conditions "as to" the rates of fare to be charged. Moreover, the same statute in which this provision originated (Laws of 1894, c. 752) itself provided in Section 63 (now Section 58) that the road or roads constructed under that chapter should be deemed part of the public streets "to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the Board of Rapid Transit Railroad Commissioners in said city,"

to which language was added, by amendment in Laws of 1909, Chapter 498, the words "or by the Public Service Commission."

But whatever the nature of the contract which Section *27* may be deemed to have authorized prior to 1907, its language is wholly insufficient to express a legislative intention that the fares to be charged and character of service to be rendered by rapid transit railroads should be excluded from the new public policy embodied in that year in the Public Service Commissions Law. This would be true regardless of the amendment of 1910, above referred to, in which rapid transit railroads were expressly referred to in connection with the regulatory power of the Commission over fares. Contracts inconsistent with the legislative policy, by which rates were to be just and reasonable alike for carriers and the public, were prohibited. This is manifest from the decisions of the Court of Appeals of New York, above cited, with respect to contracts made pursuant to Section 18 of Article III of the Constitution and the Greater New York Charter and other statutes which had prior to 1907 authorized contracts for rates or fares.

The case of *People ex rel. New York, New Haven & Hartford Railroad Co. v. Willcox*, 200 N. Y. 423, cited by the defendant Commission, is manifestly not in point. It involved a complaint with respect to "the unsanitary and offensive manner" in which the railroad "loads and maintains its manure cars in the Harlem River yards." It was a proceeding to abate a "nuisance" affecting the public health and alleged to be in violation of the Sanitary Code, which matters were by explicit statutory provisions made subject to "the *exclusive* local jurisdiction" of

the Department of Health of the City of New York. Such matters did not come within the *express* language of the Public Service Commissions Law respecting the regulation of the "practices, equipment, appliances, or service" of railroad corporations or "general supervision" of common carriers. The Court of Appeals held that the Department of Health had exclusive jurisdiction. In the present case the situation is reversed. The Public Service Commission was explicitly given power to regulate rates and the Rapid Transit Act contained no express language inconsistent therewith. The other cases cited (*Village of Fort Edward* v. *Hudson Valley Railway Co.*, 192 N. Y. 139; *City of New York* v. *Brooklyn City Railroad Co.*, 232 N. Y. 463) are likewise inapplicable for similar reasons.

THE CONTINUATION IN THE RAPID TRANSIT ACT AFTER 1907 OF THE PROVISIONS OF SECTIONS 24 AND 27 DOES NOT IMPORT AN INTENTION TO EXCLUDE THE FARE PROVISIONS FROM THE POLICY OF THE PUBLIC SERVICE COMMISSIONS LAW.

The remaining ground for defendants' argument based on the Rapid Transit Act, is therefore, that in amendments thereof in 1909 and 1912 after the passage of the Public Service Commissions Law, the Legislature re-enacted without change the language of the earlier statute that:

> "Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished, and otherwise as said commission shall deem to be best suited to the public interests."

But this does not meet the requirements of defendants' position.

In the first place, defendants attach altogether disproportionate significance to the term "re-enactment." In New York "re-enactment," in the only sense here involved, is the accepted method of amending a statute. The amendment does not ordinarily take the form that such and certain words shall be added to or stricken from a particular section to be amended, but rather the form is that that section "is hereby amended to read as follows:", which language is followed by the entire section in its amended form. It was only in this sense that the old Section 34 of the Rapid Transit Act which contained the provision for the insertion of a contract as to fares, was "re-enacted" in 1909 and 1912. The language authorizing a provision regarding fares remained unchanged from the time of its enactment in 1894 through all of the "re-enactments" by which that section was in other respects amended between then and the year 1913 when Contract No. 3 was executed.

Section 95 of the *General Construction Law* of New York provides:

> "The provisions of a law repealing a prior law, which are substantial re-enactments of the provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, *and not as new enactments.*"

The provisions of that act "are but declaratory of the rule previously laid down by the Courts in numerous cases." *Matter of Allison* v. *Welde*, 172 N. Y. 421, 431.

Moreover, the case of *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 350, and the other leading decisions of the New York Court of Appeals which we

have cited above are express authority that no such significance is to be attached to "re-enactment" of a statute authorizing a contract for fares, and that the continued existence of such a statute after the enactment of the Public Service Commissions Law furnishes no basis for the imputation of legislative intention to exempt the rates provided under any such contract from continuous regulation.

At the time the Public Service Commissions Law was enacted in 1907, there were two sorts of statutes relating to the prescribing of rates or fares of utilities. Statutes of the first sort by their own terms fixed the rates or fares. Statutes of the second sort authorized the making of contracts between municipalities and utilities relating to rates or fares.

Statutes of the first sort included the following: Section 37 (later 57) of the Railroad Law, that railroads of various classes therein specifically defined might collect a specified number of cents per mile and in all other cases three cents for every mile; Section 101 (later 181) of the Railroad Law, relating to street *surface* railroads, prescribing a maximum fare of five cents for one continuous ride, with certain specified exceptions; Section 7 of the Rapid Transit Act (as amended by Laws of 1894, c. 752), providing that the rate of fare on privately constructed and operated rapid transit railroads within the City of New York "shall not exceed five cents under any provision of this act."

The second category included the following: Section 18 of Article III of the Constitution and Sections 73 and 74 of the Greater New York Charter, already referred to; Section 61 (later 11) of the Transportation Corporations Law, which provided that a gas or electric

light corporation should have the power to lay conductors for conducting gas through streets "with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe"; Section 45 (later 86) of the Transportation Corporations Law, containing similar provisions with respect to the consent of local authorities for the use of streets by pipe line corporations; Section 93 (later 173) of the Railroad Law, regulating the sale of franchises for street railways in cities of the first class, providing that the consent of the local authorities thereto should contain, among others, "additional conditions as the local authorities may in their discretion prescribe" and that "such consent shall provide but that one fare shall be exacted for passage" over any branch or extension as therein described; and Section 34a (later 27) of the Rapid Transit Act, already quoted.

After the enactment of the Public Service Commissions Law the statutes which had themselves fixed specific fares were for the most part either repealed or amended so as expressly to be made subject to the Public Service Commissions Law. Thus Section 37 (57) and 101 (181) of the Railroad Law, above referred to, were amended by Chapter 481 of the Laws of 1910, the former by inserting at the beginning thereof the words "Subject to the provisions of the Public Service Commissions Law," and the latter by adding thereto the words "and the Public Service Commission shall possess the same power [to regulate the rate of fare], to be exercised as prescribed by the Public Service Commissions Law." The five-cent fare provision of Section 7 of the Rapid Transit Act, above referred to, was repealed by Chapter 498 of the Laws of 1909.

But the statutes which had authorized simply the making of contracts were continued, and often "re-enacted," after 1907, without change in this respect. Thus, the language of Section 18 of Article III of the Constitution, providing for "constitutional consents" of local authorities for the occupation of streets by street railway companies, was in no way changed. Section 73 of the Greater New York Charter was continued after 1907 without change and Section 74 thereof, which was the section providing that the contract therein authorized should contain "all the terms and conditions, including the provisions as to rates, fares and charges," was "repealed" by Chapter 467 of the Laws of 1914, and that repealing statute then amended the Greater New York Charter by inserting a new Section 74, which contained identical language. Section 93 (173) of the Railroad Law, above referred to, has been twice amended and its material language "re-enacted" since the passage of the Public Service Commissions Law (Laws of 1908, Chap. 475; Laws of 1928, Chap. 546); and Section 61 (11) of the Transportation Corporations Law was similarly amended and "re-enacted" by Chapter 540 of the Laws of 1920 and again by Chapter 539 of the Laws of 1923, and both Sections 61 (11) and 45 (86) were amended and "re-enacted" by Chapter 762 of the Laws of 1926. By the Laws of 1915, Chapter 667, the Transportation Corporations Law was amended by adding Section 26, which provided for the granting by the municipalities of their consent to the use of the streets by stage coach corporations upon "conditions".

But, in spite of the continuation or "re-enactment" after 1907 of all of these statutes authorizing contracts relating to rates or fares, the Court of Appeals of New

York has never held that after 1907 a contract for an unchangeable rate or fare could be made thereunder. And the Court of Appeals has expressly held that certain of these continued and "re-enacted" statutes did not, at least after 1907, authorize a contract for a rate or fare which should not be subject to revision up or down. *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, and *People ex rel. Garrison* v. *Nixon*, 229 N. Y. 575, 645, involved contracts made under the authority of the constitutional provision and the Greater New York Charter. *Matter of Evens* v. *Public Service Commission*, 246 N. Y. 224, involved the constitutional provision and Section 173 (formerly 93) of the Railroad Law. *Town of North Hempstead* v. *Public Service Corporation of Long Island*, 231 N. Y. 447, and *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146, held that contracts made under Section 61 (later 11) of the Transportation Corporations Law after 1907 could not effectively provide that the rates therein specified were unchangeable.

The statutes under which the rate contracts involved in those cases were made were just as clear legislative authority therefor as were the provisions of the Rapid Transit Act for Contract No. 3 and the Elevated Extension Certificates. The assertion of the Transit Commission (Brief, pp. 180-181, see also 146-149) to the contrary is quite unfounded. Quite apart from the constitutional provision, the fare contract involved in the *Nixon* case was "authorized" by Sections 73 and 74 of the Greater New York Charter, the striking similarity of which to Sections 24 and 27 of the Rapid Transit Act may be graphically shown by the following comparison:

Section 73 of the Greater New York Charter, relating to "Limitation and Conditions to Grants of Franchises," provides, in part:

"*Every grant shall make adequate provision* by way of forfeiture of the grant, or otherwise, to secure *efficiency of public service at reasonable rates* and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for."

The Rapid Transit Act, Sec. 24, subdiv. 1, applicable only to the Elevated Extension Certificate, provides, in part:

"* * * and the Commission shall with like approval fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, *and such other terms, conditions and requirements as to the said boards may appear just and proper.* * * *."

Section 74 of the Greater New York Charter, relating to "Proceedings Prior to Grant of Franchise," provides, in part:

"The Board of Estimate and Apportionment shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and *shall embody the result of such inquiry in a form of contract with all the terms and conditions, including the provisions as to rates, fares and charges.*"

The Rapid Transit Act, Sec. 27, subdiv. 3, applicable only to Contracts Nos. 1, 2 and 3, provides, in part:

"3. *Every such contract shall contain such terms and conditions* as to the *rates of fare to be charged* and the *character of services to be furnished* and otherwise as the said Commission shall deem to be *best suited to the public* interests, *and subject to such public supervision*, and to such conditions, regulations and requirements as may be determined upon by said Commission, with like approval * * *."

Authority to insert in a contract a provision as to fares remained after the passage of the Public Service Commissions Law. But at least since 1907 no such contract could be deemed to be in derogation of the new legislative policy of continuous reasonableness. No such contract could effectively bargain away either the municipality's right to object to an excessive rate or the utility's right to fair compensation.

The leading cases in the New York Court of Appeals which we have cited in this brief all construed the Public Service Commissions Law in the same, or substantially the same, form in which it existed in 1913, when Contract No. 3 and the Elevated Extension Certificate were executed. Amendments to Section 49 were made in 1921 and 1922, upon which considerable emphasis is placed by the defendants. But these amendments showed clearly that the Legislature regarded rapid transit railroads as governed by the provisions of Section 49, and that, if any special provisions were to be made as to those railroads, they should be embodied in amendments to the Public Service Commissions Law. The amendments of 1921 and 1922 are not here material because in 1923 Section 49 was again amended to substantially the same language as had been in force prior to the 1921 amendment. The verb "prescribed" was changed back to "authorized." The cases of *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, and *People ex rel. Garrison* v. *Nixon*, 229 N. Y. 575, 645, were decided under the law as it existed prior to the 1921 amendment, and *Matter of Evens* v. *Public Service Commission*, 246 N. Y. 224, was decided under the law as it existed after the 1923 amendment, which had restored it to its original form. The New York courts

held in *Matter of Village of Mamaroneck* v. *Public Service Commission*, 208 App. Div. 330, 333, affirmed without opinion 238 N. Y. 588, and *Matter of Brownville* v. *Public Service Commission*, 209 App. Div. 640, affirmed without opinion 240 N. Y. 586, that the final result of the legislation which defendants emphasize was to leave the regulatory power over contract rates in exactly the position that it was prior to 1921. The *Nixon* and *Garrison* cases had construed that law as it existed prior to 1921.

> "When the legislature amends or considers afresh a statute it will be assumed to have knowledge of judicial decisions interpreting the statute as then existing and if it deals with it in a manner which does not rebut or overthrow the judicial interpretation it will be regarded as having legislated in the light of and as having accepted such interpretation." *Orinoco Realty Co.* v. *Bandler*, 233 N. Y. 24, 30.
>
> *Matter of Cole*, 235 N. Y. 48, 53.

THE CIRCUMSTANCE THAT THE 1912 AMENDMENTS OF THE RAPID TRANSIT ACT WERE MADE WITH PARTICULAR REFERENCE TO PROPOSED CONTRACT NO. 3 DOES NOT EVIDENCE ANY LEGISLATIVE INTENTION TO AUTHORIZE AN UNCHANGEABLE FARE.

The circumstance emphasized by the defendants that the Rapid Transit Act was amended and re-enacted in 1912 (Laws of 1912, c. 226) for the purpose of authorizing a contract of the general nature of Contract No. 3, is of no significance.

The language of Section 27 of the Rapid Transit Act relating to provisions as to the fare had been in the act since 1894 and was not touched in the statute of 1912.

The provisions of proposed Contract No. 3 which necessitated the 1912 amendments were those authorizing both the City and the plaintiff to invest millions of dollars in the building and equipment of subways, repayment of which was to be secured only from the earnings of the roads (*Admiral Realty Co. v. City of New York*, 206 N. Y. 110). Prior to 1912 the method of financing construction had been for the Comptroller of the City of New York, upon requisition of the Commissioners, to issue bonds of the City, which when sold yielded funds for construction purposes. The operating company assumed the interest burden upon these bonds. This was the procedure followed for the building of the original subway lines under Contracts Nos. 1 and 2.

When, however, the definitive proposal of the plaintiff, which ripened into Contract No. 3, was submitted, it was unwilling to assume unconditionally as a company burden the interest obligations upon sums as large as were required to construct the enormous amount of trackage which was contemplated. Accordingly, its proposal was that interest charges upon the money to be provided by the City should be paid only out of earnings. It was therefore provided that the revenues of the entire subway system, after payment of operating expenses, taxes and other specified charges, should be devoted under a plan of "preferential payments" therein prescribed: First, to the City a sum equal to its rentals under Contracts Nos. 1 and 2; second, to the Company an amount equal to its annual profit from the operation of the existing subway system, 5 per cent. interest upon its contributions to construction cost of the new lines and the actual interest paid by it upon the cost of additional equipment, plus, in both cases,

an additional 1 per cent. for amortization; third, to the City an 8.76 per cent. return upon its contribution to construction cost and actual interest plus 1 per cent. as amortization on the cost of additions. The balance of the revenue was to be divided equally between the City and the Company.

When the terms of this definitive proposal were announced, a taxpayer's suit was instituted to prevent the execution of a contract embodying the above described method of financing, which had thitherto not been contemplated by the statute. The first objection urged was that the Rapid Transit Act did not authorize such terms. This objection was cured by the 1912 amendments. The second objection was that the postponement, under the plan of preferential payments above outlined, of the payment of interest charges and amortization upon the City funds used in the construction of the subways violated the provisions of the State Constitution prohibiting the loaning of credit by a municipality. This was the only substantial contention urged when the taxpayer's suit was tried after the passage of the 1912 amendments (*Admiral Realty Co. v. City of New York*, 206 N. Y. 110).

The defendants' contention that the *Admiral Realty Company* case, in holding that the 1912 amendments were constitutional and authorized the making of Contract No. 3, decided the question of the validity of a contract provision for an unchangeable five-cent fare, is wholly inadmissible. Neither the statutory authority for a provision as to the fare (which had been in the law since 1894) nor the provision in Contract No. 3 for a single fare of five cents, was in any way drawn in question. The question litigated was whether the provisions

of Contract No. 3 for division of the revenues between the plaintiff and the City, and the postponement of the payment of charges upon the funds contributed by the City to the cost of construction, infringed Section 10 of Article VIII of the State Constitution, providing that "no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation * * *." The Court's references to the five-cent fare provision were merely descriptive. The five-cent fare was not mentioned in the contract as one of the moving considerations for the City's covenant, but even if it had been, it would have had no bearing upon the questions litigated and decided in the *Admiral Realty Company* case. The Court of Appeals recognized that no question relating to the considerations passing to the City were necessary or material to the decision of the case. The Court, after saying (p. 125) that "it is to be borne in mind at the outset and at every point of our discussion that this court has nothing whatever to do with the wisdom of the proposed contracts," said (p. 132):

> "For if it be once decided that the municipality has the right to bargain with the Interborough Company for a modification of the latter's lease of the old subways so as to bring them into a unified system of transportation with the new ones, the consideration to be paid for such modification, in the absence of fraud or collusion which is not charged, rests in the discretion and judgment of the public officials, and certainly as observed before, it is not objectionable that instead of burdening the municipality with more rapid and oppressive methods of payment it is

> provided that this consideration shall be paid from year to year out of the earnings of the railroads."

And in his dissenting opinion, Chief Judge Cullen tersely expressed the same understanding of the issue before the Court. He said (p. 152):

> "As already said, the Constitution does not forbid the city doing certain things without consideration, but doing them at all with or without consideration."

The decision of the Court of Appeals in the *Admiral Realty Co.* case would have been the same whether the fare provided in Contract No. 3 was five, ten or two cents and would have been the same whether that fare was an unchangeable fare, or, as was actually the case, a fare initially adopted but subject to the right of the City to secure a reduction thereof if experience proved it to be unreasonably high and of the Company to secure its increase if experience should prove it to be confiscatory. Whatever the rate of fare, the facts still remained that under Contract No. 3 the City was to issue its bonds and obligate itself to pay the principal and interest thereon without having from the Company an unqualified obligation of reimbursement. The size of the fare affected only the probable amount of the operating earnings of the Company out of which alone reimbursement to the City was to come. It, therefore, related only to the wisdom of the contract from the City's point of view which was in no way before the Court.

The 1912 amendments to the Rapid Transit Act may have an important bearing on many features of Contract No. 3. But they are of no significance with respect

to the fare provision. The features of the proposal, which ripened into Contract No. 3, which led to the 1912 amendments were not the provisions relating to the fare. It required no amendment to authorize a contract "as to" the fare to be charged. That language had been in the statute since 1894. After the passage of the Public Service Commissions Law in 1907, it would have required an amendment of that provision to authorize a contract for an unchangeable fare. If the Legislature had intended that the fare to be contracted for should be an exception to its policy of continuously just, reasonable and compensatory rates, it could have manifested such intention by a few simple words. But no such amendment was made. If authority was desired to enter into a contract for an unalterable five-cent fare, such authority was not conferred by the 1912 amendments or by any other statute.

In November, 1912, several months before Contract No. 3 and the Elevated Extension Certificate were executed, the Appellate Division for the First Department had decided the case of *People ex rel. Bridge Operating Company* v. *Public Service Commission*, 153 N. Y. App. Div. 129. That was a certiorari proceeding to review an order of the Public Service Commission reducing and fixing the fares which might be charged by the relator for the transportation of passengers over the Williamsburg Bridge. The railroad property there involved, other than the rolling stock, all belonged to the City of New York, and the former fare was prescribed in a contract made in 1904, prior to the enactment of the Public Service Commissions Law, between the Company and the City through its Bridge Commissioner. The Court expressly found (p. 132) that the

contract had been entered into "pursuant to the authority of the various acts" enumerated in the opinion. The Court held that the Legislature had reserved power to alter the rate of fare prescribed by the contract, and had conferred that power on the Public Service Commission by virtue of the Public Service Commissions Law. It said (p. 137) that the case must be considered "as if the Legislature itself had, by act, reduced the fares to be charged," and that the question was whether the contract of 1904 "operated to unalterably regulate and fix the fares in question during the term of the license." The Court held that it did not. This case may not be distinguished on the ground that this contract created only a "license," rather than a leasehold. The question is of the validity of the agreement as to fares, not as to the *quantum* of the estate. The decision, relating as it did to a contract antedating the Public Service Commissions Law, was of the same sort as that of the Court of Appeals in *People ex rel. Village of South Glens Falls* v. *Public Service Commission*, 225 N. Y. 216, and is referred to in the concurring opinion of Judge McLaughlin in that case (225 N. Y., p. 227).

The fare provisions in Contracts Nos. 1 and 2 do not affect the plaintiff's right to a compensatory fare.

Contract No. 3, which applied to all of the subway lines, both those already in existence and those to be thereafter constructed, was executed in 1913, six years after the passage of the Public Service Commissions Law. Under all the New York authorities it could not be regarded as effectively embodying a contract for an unchangeable fare.

THE FARE PROVISIONS OF CONTRACTS NOS. 1 AND 2 WERE WHOLLY SUPERSEDED BY CONTRACT NO. 3.

Upon the execution of Contract No. 3, the fare provisions contained in Contracts Nos. 1 and 2 were superseded and became wholly ineffective.

In *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, 133, the Court of Appeals said that "by the proposed contract [No. 3] this lease [Contracts Nos. 1 and 2] is to be modified *and superseded* by a new agreement," and the terms of Contract No. 3 clearly demonstrate that such is the only admissible conclusion.

Two-thirds of the present subway lines were built under Contract No. 3. The mileage constructed under Contracts Nos. 1 and 2 was only 73 miles of single track. That constructed under Contract No. 3 was 140.8 miles. Under Contract No. 3 there were to be two substantially parallel subway lines, one running from the Bronx down the west side to Times Square and thence to lower Manhattan and Brooklyn, the other running from the Bronx down the east side to Grand Central and thence to lower Manhattan and Brooklyn. No passenger contemplating a through trip would travel over the old line, which ran down the west side from the Bronx to Times Square, thence east to Grand Central and thence down the east side to lower Manhattan and Brooklyn. The Times Square to Grand Central track under Contract No. 3 became a mere shuttle, necessitating a change of trains. Through passengers would use either the east or the west side line for the whole distance.

But the fare provision of Contracts Nos. 1 and 2 applied to the west side line only from the Bronx south

as far as Times Square. The fare provisions of those earlier contracts with respect to the new east side line did not apply north of Grand Central. The Brooklyn limit of the five-cent fare under the old contracts was the Atlantic Avenue station of the Long Island Railroad Company. The Brooklyn extensions made under Contract No. 3 were many miles in length, one extending to near Coney Island.

Moreover, the fare provisions of contracts Nos. 1 and 2 (Appendix, pp. 142, 143) permitted the plaintiff to run one *de luxe* car on each train, for which a reasonable additional charge for additional conveniences thereon furnished might be collected. The City was apparently unwilling that this privilege should be continued.

It was therefore essential that Contracts Nos. 1 and 2 be superseded, at least in so far as the fare provisions were concerned. Contracts Nos. 1 and 2 contained no provisions which would have made possible the purpose of a single fare covering the entire subway system, which was emphasized repeatedly in Contract No. 3 (see recitals and Arts. I, XLVII, XLIX and LIX, Appendix, pp. 144, 145, 147, 148, 158).

Moreover, Contracts Nos. 1 and 2 were to expire at different times, No. 1 in 1954, with a right to the plaintiff to renew for twenty-five years, and No. 2 in 1943. Contract No. 3 was to expire on December 31, 1967, subject to provisions for termination, on the terms provided, at any time after the first ten years of operation. It was necessary to supersede the earlier contracts so as to bring the length of time during which the contract should apply over all parts of the system into agreement.

The provision of Contract No. 3 that "nothing in this contract shall be construed as a modification *or waiver* of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, *except in the respect and to the extent herein specifically set forth*," is contained in the very article (Art. I) in which the Company agrees to operate the new lines "in conjunction with the railroads heretofore constructed at the expense of the City under Contract No. 1 and Contract No. 2 for a single fare, in accordance with this contract."

It is plain, therefore, that the fare provisions of Contracts Nos. 1 and 2 were wholly terminated and superseded by the comprehensive provisions of Contract No. 3. The courts of New York have held prior fare contracts to be superseded by later ones in circumstances wholly analogous to those here involved.

In *Matter of Ezens* v. *Public Service Commission*, 240 N. Y. 224, the Court of Appeals, in holding that a five-cent fare imposed as a condition of a constitutional consent for one street railway line in Binghamton did not survive a new franchise made after the consolidation of that line with several others into a unified traction system, said (p. 231):

> "It would be strange indeed, if upon consolidation of all these various railroads into the Binghamton Railroad Company, a small portion only of the line—that of one of the roads—should be restricted to a five-cent fare, that as to the territory served by all the other consolidated roads, the rate of fare was subject to the powers of the Public Service Commission. Whatever we may spell out piecemeal from these various franchises, the public saw and

> dealt with one continuous consolidated line, with its branch connections. The common council of the city, after consolidation, treated with one corporation, the Binghamton Railroad Company."

In *Matter of Fagal* v. *Public Service Commission*, 131 Misc. (N. Y. Sup. Ct.) 398, it appeared that the Schenectady Railway Company operated a surface railway system in the City of Schenectady and adjacent territory. A portion of its line was constructed under a constitutional consent granted between 1875 and 1907 which imposed the condition that the rate of fare should not exceed five cents. An application was made by the railway company to the Public Service Commission to put into effect an increased rate of fare upon the entire system. The Supreme Court held, relying upon *Matter of Evens, supra*, that the Commission had jurisdiction so to increase the fare.

The contention of the defendants that this case is within the "reservation" in the last paragraph of the opinion of the Court of Appeals in the *Nixon* case is wholly inadmissible. The Court of Appeals said (*229 N. Y. p. 362*):

> "In thus holding, it may be prudent, even though unnecessary, to say that we decide the case before us, and no other. The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this

> case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed."

Any supposition that this reservation was intended to apply to subway contracts Nos. 1, 2 and 3 would be wholly without foundation. The reservation manifestly relates to the franchises involved in the *Garrison* case, 229 N. Y. 575. That case involved separate applications for *certiorari* on the relation of the receiver of three street railroad companies to review orders of the Public Service Commission, which had denied their applications for an increase of fare from five cents to eight cents. The Court construed the application as one for an increase of fare on the entire route, and, as the street railway system involved consisted of a number of companies operating under many different franchises, some of which were under constitutional consents given prior to 1907 and so fell under the rule of the *Quinby* case, while others did not, affirmed the judgments of the lower Court, dismissing the writs of *certiorari*, but "without prejudice to the right of the relator to make separate applications as to the franchises which come within the jurisdiction of the Public Service Commission as herein indicated."

This case had been considered together with the *Nixon* case and the decisions were announced upon the same day. One of the contentions in the *Garrison* case had been that the franchises granted in 1916 to certain of the companies involved were new contracts superseding all previous agreements with local authorities as to rates of fare. No opinion upon this contention was announced. Following the decision, the companies applied

for rehearing and then pressed this point. On rehearing, the Court of Appeals said (229 N. Y., p. 645) that this proposition was fully considered on the original argument and the conclusion reached that

> "under all of the circumstances attending the granting of said franchises and including the saving clause in respect of fares on constituent roads therein contained, said franchises did not have the effect of superseding and so abrogating franchises and contracts regulating fares on constituent roads as to become franchises or contracts beyond the scope of the Quinby case."

This decision, however, was not announced in the original *per curiam* opinion of the Court, which was decided on the same day as the *Nixon* case. It was therefore most natural that the Court, not then wishing to write on that question, but knowing that it would be raised upon the new applications for *certiorari*, without prejudice to which its *per curiam* opinion was rendered, should desire to save such questions from the otherwise sweeping effect of its opinion in the *Nixon* case. It was manifestly only because the Court had before it, when it decided the *Nixon* case, the franchises involved in the *Garrison* case, that it inserted the reservation on which defendants rely.

But in the instant case there was no such "saving clause in respect of fares on constituent roads" as led the Court of Appeals in the *Garrison* case to hold that the latter franchise had not superseded the former one. On the facts, the situation involved in the *Garrison* case was wholly different from that here involved, and we have above demonstrated that the language of the Court of Appeals to which defendants refer may not be deemed

to have any significance apart from the very franchises which the court there had under consideration.

THE FARE PROVISIONS OF CONTRACTS NOS. 1 AND 2 WERE NOT IMPOSED AS CONDITIONS OF "CONSTITUTIONAL CONSENTS."

But, whether superseded or not, the fare provisions of Contracts Nos. 1 and 2 were subject to the later exercise by the State of New York of its police power to regulate them. *City of New York* v. *Campbell*, 277 U. S. 573 (involving a contract with the City of New York); *Trenton* v. *New Jersey*, 262 U. S. 182; *Englewood* v. *Denver & South Platt Ry. Co.*, 248 U. S. 294; *Hunter* v. *Pittsburgh*, 207 U. S. 161; *People* v. *Budd*, 117 N. Y. 1; *People ex rel. New York Electric Lines* v. *Squire*, 107 N. Y. 593; *People ex rel. Bridge Operating Co.* v. *Public Service Commission*, 153 N. Y. App. Div. 129. The State of New York did exercise its police power in 1907 by its delegation to the Public Service Commission thereby created of the power to regulate substantially all public utility rates. *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356. Under the decisions of the Court of Appeals of New York, the only contract rates to which that enactment did not apply retroactively were provisions for stated fares exacted by local authorities under Section 18 of Article III of the Constitution between 1875 and 1907 as conditions for giving their consent to the occupation of public streets.

It is plain that the fare provisions in Contracts Nos. 1 and 2 were not made as conditions of constitutional consents. Each of those contracts contains a recital

showing that the consent of the local authorities had previously been given:

> "The routes and general plan for the railroad adopted by the board [of Rapid Transit Railroad Commissioners] by its resolution of [earlier dates specified] and *heretofore* approved by the authorities of the city and by the Appellate Division of the Supreme Court * * * shall be deemed to be incorporated into this contract as a partial description of the Railroad and Equipment * * *" (Contract No. 1, Chap. 1, p. 13; Contract No. 2, Chap. 1, p. 18).

The complaint alleges that the City gave separate and unconditional consents under Section 18 of Article III of the Constitution (Complaint, pars. LXII and LXIII, R. vol. I, pp. 51, 52). This is supported by the affidavit of Mr. Norton (R. vol. II, pp. 1110-1112). Contracts Nos. 1 and 2 show no signing or approval thereof by the City of New York. They are signed by the Board of Rapid Transit Railroad Commissioners, which was a State, not a city, body. The only signature of any City official is that of the Corporation Counsel to an approval *as to form*.

Contracts Nos. 1 and 2 were entered into pursuant to the Rapid Transit Act. The provisions of that Act, as they stood at the dates in question, preclude those contracts from being regarded as conditions attached to constitutional consents.

To the State body, the Board of Rapid Transit Railroad Commissioners, was delegated, by Chapter 4 of the Laws of 1891, the duty of determining whether it was desirable to establish a system of rapid transit railways, and, if so, their route and the general plan of construction. And the Board was authorized to locate

the routes through and across streets and avenues within any such city:

> "* * * provided that the consent of the owners of one-half in value of the property bounded on, and the consent also of the *local authorities having control of that portion of a street or highway* * * * be first obtained."

The authority having control of the streets of the City of New York was in 1900 the Common Council, and by amendment in Laws of 1901, Chapter 466, the Board of Aldermen and the Mayor. And Section 5 of the Rapid Transit Act contained appropriate provisions for securing its consent.

Section 6 provides that "*when the consents of the local authorities* and property owners" "*shall have been obtained*," the Board of Rapid Transit Railroad Commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such railway, and the contract provided in Section 34 (now 27) for the construction and operation of the railroad, and which might contain "such terms and conditions as to the rates of fare to be charged and the character of service to be furnished" was then to be made. It is thus manifest that the contract for the construction of the road, which was the only contract in which any provision as to fares was authorized, was to be made not by the City but by the State body, long after, and wholly separately from, whatever instrument might theretofore have evidenced the consent of the local authorities to the general route to be followed.

This construction of the above statutes as they existed when Contracts Nos. 1 and 2 were executed is made the more plain by reference to their subsequent amendment.

The City at the time of the making of Contracts Nos. 1 and 2 had no control over the amount of bonds that might be issued to pay for construction. That authority resided in the Board of Rapid Transit Railroad Commissioners, a State body, and the law itself prescribed a maximum amount. By Chapter 562 of the Laws of 1904 the Legislature removed the limitation upon the amount of the bonds that might be issued for construction purposes and gave to the Board of Estimate and Apportionment of the City, which was the agency in which the Legislature had by the Charter vested control of fiscal matters, the right to approve the contracts entered into by the Board of Rapid Transit Railroad Commissioners.

But such approval of the contracts by the Board of Estimate and Apportionment could not be the "constitutional consent" because the authority having control of the streets was not then the Board of Estimate and Apportionment, but the Municipal Assembly, which was the successor of the Common Council.

Administrative construction of the Public Service Commissions Law as applying to rapid transit railroads.

Defendants' contention, that the Rapid Transit Act dealt so comprehensively with the subject of rapid transit railroads in the City of New York that a legislative intent to exclude such railroads from the operation of the Public Service Commissions Law, has never been suggested except in connection with the provision for a fare to be charged. More than twenty years have passed since the enactment of the Public Service Commissions Law. During that time the Public Service Commission and its successor, the Transit Commission,

have fully exercised every other regulatory power over the plaintiff and the railroads operated by it which that law conferred.

Indeed, in the first annual report of the Public Service Commission for the First District to the New York Legislature (Vol. 1; N. Y. Sen. Doc. 1908 IV, Vol. 4, No. 20, Pt. 1, pp. 7-9) the Commission definitely asserted the applicability of the provisions of the Public Service Commissions Law to the fares to be charged by rapid transit railroads. Pointing out that besides its regulatory powers the Commission had all the powers of the Board of Rapid Transit Commissioners, which was abolished by the Public Service Commissions Law, it said:

> "So far as the transportation problem is concerned, therefore, the Commission has two strings to its bow; it may build subways, as its predecessor did, the Rapid Transit Board; and it may order *existing companies* to increase their service, *adjust fares* and freight rates, improve their equipment, etc. * * *."

The language of Section 27 of the Rapid Transit Act is that such contract shall contain such terms and conditions "as to rates of fare to be charged *and the character of services to be furnished* and otherwise" as the Commission shall deem best suited to the public interests. If the Act authorized a contract for unchangeable "rate of *fare*," it just as clearly authorized a contract for an inflexible "character of *service*." For instance, the contract might have provided (as it did not) that the plaintiff should on all its lines run one express train of ten cars every three minutes. That probably would have provided adequate facilities in 1913, but at least since the enactment of the Public Service Commissions Law,

plaintiff would scarcely be heard to contend that by such a contract the City had bargained away its right to insist upon more adequate facilities. It cannot with any greater reason be contended that the Company by contracting in 1913 for a five-cent fare bargained away its constitutional right to claim a higher fare after the five-cent rate had become confiscatory.

Through all the applicable sections, both of the Rapid Transit Act and the Public Service Commissions Law, the subjects of rates and service are treated together. Indeed, they are necessarily interrelated; the one concerns the income, the other the outgo. A legislative intention that a utility should be subject to continuous regulation of its outgo through requirements of constantly improved and enhanced service, without any corresponding right to such an increase in fare as would make its income adequate for such requirement, is not to be implied.

Of course the Public Service Commission and its successor, the Transit Commission, have constantly regulated the outgo of the plaintiff through orders relating to the character of its service. In the Appendix, pages 242-250, we have printed a summary of typical cases in which the Commission has exercised regulatory powers over the plaintiff under the Public Service Commissions Law. Its first action, Case No. 1, was an order adopted July 30, 1907, requiring all companies under its jurisdiction to report all accidents, collisions, derailments and serious interferences with traffic. This has been administered so as to include the plaintiff (Annual Report, 1907, Vol. I, p. 682).

Other cases summarized in the Appendix are: Case No. 556, a hearing on motion of the Commission on

the question of improvements and additions to the service of the plaintiff in respect to the extension of the Broadway subway express service to Kingsbridge and of the local service to Dyckman Street; Case No. 629, also on motion of the Commission, relating to changes in subway cars and in respect to the type of car to be purchased for future use on the subway; Case No. 1074, the new side-door order of May 14, 1909; Case No. 1628, on motion of the Commission, as to regulations for safeguarding and protecting employees from injury by high tension electrical apparatus and other dangerous conditions; Case No. 1790, on improvement and changes in regulations for the equipment, appliances and service of plaintiff at stations on its Third Avenue elevated line and on its Lenox Avenue subway line at 149th Street, Bronx; Case No. 1902, on motion of the Commission, on preventive precautions in respect of fires and short circuits; Case No. 2005, on motion of the Commission, regarding hours of labor of certain employees; Case No. 2136, on motion of Police Commissioner, regarding protective railings at stations; Cases Nos. 2311 and 2627, on motion of the Commission, relating to service generally; Case No. 2081, whereby plaintiff was ordered on June 9, 1925, to make connection by subway and ramps between the subway and elevated stations at 149th Street and Third Avenue, the order reciting that it was made *"in the exercise of the powers vested in it [the Commission] by virtue of the Public Service Commission Law"*; Case No. 2849, on motion of the Commission, regarding cleanliness and sanitation of stations, toilet rooms, tunnels, etc. Finally, there is the threatened order of the Commission, referred to in the complaint herein, for a great number

of additional cars, compliance with which would require an aggregate capital expenditure of many million dollars (R. vol. II, pp. 811-812).

Thus, the Commission, while denying that it has any power of regulation of the income of the plaintiff, claims and exercises all the jurisdiction and power conferred by the Public Service Commissions Law to regulate its outgo. But, asserts the brief of the Commission (page 177), its authority to regulate the character and adequacy of service furnished by the plaintiff proceeds not from the Public Service Commissions Law but solely from Contract No. 3, by which the parties "set up their own regulatory plan."

That contract does indeed provide in Article LIX that:

> "The Lessees shall operate the Railroad and Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable."

As to this it may be observed: First, that the language used in the above-quoted provision is not apt to confer upon the Transit Commission broad authority to regulate the character of plaintiff's service, at least to the extent of requiring additional service involving large capital outlays; second, that at least one of the orders to which we have above referred expressly recited that it was made "in the exercise of the powers vested in it by virtue of the Public Service Commissions Law"; and, third, that the Commission's regulation of the plaintiff has gone far beyond requirements as to "service and facilities" and has covered subjects not mentioned in Contract No. 3 and authority for regulation of which could only be found in the Public Service Commissions Law.

Thus, in Case No. 445, the Commission in 1908 took jurisdiction to approve the execution by the plaintiff of a mortgage on its property to secure an issue of bonds of not to exceed $55,000,000; Case No. 1614, the Commission in 1913 authorized the execution by plaintiff of a first and refunding mortgage securing its gold bonds, and in 1917 in Cases Nos. 2182, 2218 and 2306, the Commission authorized the issuance of $25,483,772 face amount of 5 per cent. bonds under its first and refunding mortgage of 1913 and the further issue of $39,416,000 face amount of three-year 7 per cent. notes. Contract No. 3 contained no delegation of authority to the Commission to regulate security issues. The Commission's authority on that subject proceeded solely from Section 55 of the Public Service Commissions Law which authorized the issue of stocks, bonds or notes by "a common carrier, railroad corporation or street railroad corporation" only "provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, the amount thereof and stating the purposes to which the issue or proceeds thereof are to be applied." The plaintiff and the Commission construed the implied prohibition of Section 55 as applying to the plaintiff as a street railroad corporation. The Commission also regarded the plaintiff as a street railroad corporation and so subject to its orders regarding a uniform system of accounts, regulations prescribing the form and governing the construction and filing of schedules of fares for street railroad corporations, orders regarding tariff schedules by street railroad corporations, and orders concerning the form of their annual reports. (See Cases Nos. 641, 708, 1670 and 1695 summarized in Appendix.) The authority of

the Public Service Commission to require publication of tariffs was not under Contract No. 3, but under Section 28 of the Public Service Commissions Law which related to "every common carrier"; the authority to require an annual report was under Section 46 of the Public Service Commissions Law which provided that "every common carrier railroad corporation and street railroad corporation shall file an annual report"; and the requirement as to uniform system of accounts was under Section 52, which provides that the Commission may "establish a system of accounts to be used by railroad and street railroad corporations or other common carriers which are subject to its supervision."

The regulatory powers of the Commission over the plaintiff under the Public Service Commissions Law have been judicially recognized. *Matter of Public Service Commission* v. *Interborough Rapid Transit Company*, 219 N. Y. 355. On January 7, 1913, the Public Service Commission for the First District, then comprising the same persons who executed Contract No. 3, ordered the plaintiff to run sufficient trains and cars to provide a number of seats at least equal to the number of passengers, and upon the alleged failure of plaintiff to comply commenced a proceeding under Section 57 of the Public Service Commissions Law for a peremptory writ of mandamus to compel compliance. Extended hearings were had upon the merits, the sole defense of plaintiff being that it had not "wilfully failed" to observe the order of the Commission. The Trial Court on that ground denied the application for the writ. Upon appeal the Appellate Division for the First Department affirmed that decision, but fully upheld the jurisdiction of the Commission, saying, "The applica-

tion for the writ is based on the provisions of §57 of the Public Service Commissions Law" and "the duty was enjoined on the respondent by §*26 of the Public Service Commissions Law* to furnish 'such service and facilities as shall be suitable and adequate.'" The opinion refers to Section 56 of the Act, quotes Section 49 and then states, "On the 7th day of January, 1913, the Commission, *pursuant to the statutory provisions last quoted*," made the order in question. In the Court of Appeals the brief for the Public Service Commission quoted Section 49, the regulatory section of the Act, and said, "Acting under this mandatory provision of the law" the Commission made the order in question. The brief for plaintiff relied only upon the absence of proof of wilful refusal and contended that the remedy of the Commission, if any, was not under Section 57 for a peremptory writ of mandamus, but under Section 56 for recovery of penalty. The Court of Appeals affirmed the order of the Appellate Division upon the ground that wilful refusal had not been established.

Thus the Commission contended, the plaintiff conceded and all the courts of New York recognized, the applicability of the Public Service Commissions Law to the plaintiff and the rapid transit railroads operated by it.

The Public Service Commissions Law imposed the duty of regulation with respect to fares as explicitly as with respect to the character of service to be rendered. The Rapid Transit Act authorized a contract with respect to character of service no less explicitly than it did with respect to fare. Neither the State, through the Commission, nor the City, bargained away by Contract No. 3 their right to insist on safe and adequate

service. No more did this plaintiff thereby bargain away its correlative right to a compensatory fare.

There is no reference to fares in the authorizing statute for the Elevated Extension Certificate.

The above argument, that the Rapid Transit Act contained no authority for the insertion in Contract No. 3 of a provision for an unchangeable fare, applies primarily to the plaintiff's subway lines.

As to the elevated lines, there is even less basis for argument of legislative authority for a contract as to fares. The five-cent fare on the elevated lines has its origin in Chapter 743 of the Laws of 1894 (Appendix, p. 140), providing that any passenger upon the Manhattan Elevated Railway who has paid the fare required for passage between points described "not exceeding five cents" should be entitled to continuous passage without change of cars on other elevated lines there described "without the payment of additional fare." Section 27 of the Rapid Transit Act, which was the basis for Contract No. 3, did not apply to the elevated lines. The sole authority for the Elevated Extension Certificate was Section 24 of the Rapid Transit Act, which did not expressly authorize any contract with respect to fares, but only authorized the Commission to "fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, * * *." The principle *ejusdem generis* applies.

But even if the above language were regarded as an authority to insert a provision as to fares, it would manifestly rise no higher than the authority for the provision in Contract No. 3, and would be subject to all the arguments above set forth.

No decision of this Court requires or justifies a conclusion that the plaintiff has contracted away its right to a compensatory fare.

We submit that it is plain that the Public Service Commissions Law precludes a finding of legislative authority for the insertion in any contract made after its enactment of a provision for a permanent fare, and that the provisions of the Rapid Transit Act did not furnish such legislative authority. It accordingly follows that under the decisions of this Court in such cases as *Southern Iowa Electric Co.* v. *City of Chariton*, 255 U. S. 539, and *San Antonio* v. *San Antonio Public Service Company*, 255 U. S. 547, the plaintiff has not bargained away its right to a compensatory fare.

The decisions of this Court upon which the defendants rely are wholly inapplicable. *Cleveland* v. *Cleveland City Railway Co.*, 194 U. S. 517; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, *Detroit* v. *Detroit Citizens' Railway Co.*, 184 U. S. 368, *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, *Minneapolis* v. *Minneapolis Street Railway Co.*, 215 U. S. 417, and *Superior Water, Light & Power Co.* v. *City of Superior*, 263 U. S. 125, were all cases interpreting the laws of the several States and holding that particular franchises, contracts or licenses amounted to

"contracts" within the meaning of Section 10 of Article I of the Federal Constitution, which protected the utilities involved from impairment thereof by subsequent action of the municipality or of the Legislature. Those cases go off on their own particular facts and statutes, none of which bear sufficient resemblance to the facts and statutes involved in the present case to require discussion. And in *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265, this Court held that there was not such a contract free from impairment because legislative authority therefor did not "clearly and unmistakably" appear.

No more apposite are the cases particularly relied on by the defendants in which utilities have been denied the protection of the Federal Courts against alleged confiscation. *Columbus Ry., etc., Co.* v. *Columbus*, 249 U. S. 399, *Georgia Railway & Power Co.* v. *Town of Decatur*, 262 U. S. 432, *City of Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215, *St. Cloud Public Service Co.* v. *City of St. Cloud*, 265 U. S. 352, and *Southern Utilities Co.* v. *City of Palatka*, 268 U. S. 232. In none of these cases was there at the time the contract was made any State-wide regulatory statute like the New York Public Service Commissions Law.

In *Columbus Ry., etc., Co.* v. *Columbus*, 249 U. S. 399, this Court, in holding that under the Ohio statutes the ordinances granting the franchise became a contract for a permanent fare upon acceptance, relied upon its former construction of the Ohio statutes in *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, and said (p. 408):

> "It is evident that the Supreme Court of Ohio takes the same view of the effect of such ordinances."

No question of the contract being in derogation of the legislative policy of the State was involved, and the major issue litigated was whether the company had shown "impossibility of performance" so as to justify the rescission of the contract.

In the *Palatka* case no statutory system of regulation had ever been adopted by the State of Florida. At the time of the making of the contract, and at the time of the decision of the case, the contract was subject only to the reserve power of the Legislature to enact a statute permitting regulation of rates. The highest court of Florida had held (86 Fla. 583, 606) that authority to make the contract rates in question had been conferred upon the city and that such authority "is not in derogation of any of the laws or rules of public policy in this State." The Florida court had further held (*ibid.*) that:

> "* * * the Legislature not having authorized the City or any other governing body to regulate such rates, the question as to whether the contract rates are remunerative is immaterial, and the contract controls until the legislature does act in the premises."

The decision of this Court was in accordance with the decision of the State Court, and this Court, by Mr. Justice Holmes, expressly said:

> "There is nothing in this decision inconsistent with *Southern Iowa Electric Co.* v. *Chariton*, 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547, and *Ortega Co.* v. *Triay*, 260 U. S. 103."

In the *Decatur* case and the *Opelika* case the situation, both with respect to the absence of any exercise by

the State of its power to regulate, and as to the condition of the law of the State as interpreted by its highest Court, was the same as in the *Palatka* case. The importance of the State decisions is emphasized in both cases. In the *Opelika* case this Court said, by Mr. Justice Holmes (265 U. S., pp. 217-218, 219), that "whether it [the contract] was valid under the laws of Alabama belongs to the Supreme Court of the State to decide" and that "the Alabama decisions sustain the conclusion that the City had the power to make the contract upon which it relies."

It should be observed that in the present case, the New York Legislature had acted before the contract was made. As Judge Cardozo said in the *Nixon* case (229 N. Y. 356, 358):

> "Contracts fixing rates, if made before the enactment of these statutes, were subject at the utmost to the possibility of the exercise by the state of its police power in the future. Contracts made thereafter were subject to a possibility which had become merged in a reality. It was no longer a question of what the state might do at some indefinite and unknowable time. It was a question of what the state had already done, drawing upon sources of energy, reserves of power, till then latent and potential, and manifesting its will in law."

Neither was there in *St. Cloud Public Service Co. v. City of St. Cloud*, 265 U. S. 352, any State-wide statute inaugurating a new public policy such as the Public Service Commissions Law of New York. The charter of the City of St. Cloud, which had been granted by special act of the Legislature, conferred upon it both the power to make contracts with heat, light and power com-

panies, and also, in the very same section, the authority to regulate and prescribe their rates. The highest court of Minnesota had held that special charters under analogous statutes gave the city authority to contract for specified rates. There was no question of an authority to contract being inconsistent with a broad State-wide policy of continuous regulation. There was no State-wide policy and the limited authority of the city to regulate and its authority to contract were conferred by the same instrument. But in New York the old method of contracting as to rates was superseded in 1907 by the method of regulation. As Judge Cardozo said in the *Niron* case, following the passage above quoted (p. 358):

> "A new public policy had been initiated. A new right had been declared. Rates were thereafter to be just and reasonable alike for carriers on the one side and for passengers or shippers on the other. Neither class would be permitted for its own benefit to set the rule at nought. The state through its delegate, the commission, would lower the charges if too high. It would raise them if too low."

The remaining decision of this Court upon which the defendants rely is *Henderson Water Co. v. Corporation Commission*, 269 U. S. 278. In that case the Water Company was granted a franchise by ordinance which contained a schedule of prices beyond which the grantee could not go. At the time of the making of the contract there was no State statute providing for regulation of rates. At a later date the State of North Carolina created a Corporation Commission having power to fix rates for public utilities. The Water Company filed a com-

plaint with this Commission, seeking the right to increase its rates about 10 per cent. The Commission ordered an increase of about one-half of that amount, with the direction that the company might apply for a further increase after six months of trial. After the expiration of this six months, and without applying to the Commission for an increased rate, the company filed its bill in equity to enjoin the Commission from continuing the rates which it had fixed by its first increase, on the ground that they were confiscatory.

Plainly, no question as to the binding effect of the rate contract contained in the original ordinance was involved or decided. The Corporation Commission had taken jurisdiction and had ordered an increase of rates in spite of the terms of the contract. Moreover, the City of Henderson had brought suit against the Commission to enjoin it from fixing rates different from those stipulated in the franchise, on the ground that its contract rights were being violated. This attempt on the part of the City failed, the highest court of the State holding that the Commission had power to revise rates even though fixed in a contract made many years before the enactment of the Commission Law. Thus there was, and could have been, no contention that the contract rates governed. The sole question was whether the company had sufficiently exhausted its remedies before the Commission before applying to the Federal Court for relief against confiscation. This Court held, in all the circumstances, that it had not.

THE THEORY THAT PLAINTIFF WAS BOUND BY A CONTRACT FOR A FIXED FARE, SUBJECT TO A PRIVILEGE TO APPLY TO THE COMMISSION FOR AN INCREASE THEREOF, AND THAT A DENIAL OF SUCH INCREASE BY THE COMMISSION RAISES NO FEDERAL QUESTION, IS CONTRARY TO EXPRESS DECISIONS OF THIS COURT.

The defendant Commission attempts to spell out of the *Henderson Water Company* case a theory that in such circumstances the action of the Commission, in denying an increase, or in granting too small an increase, does not raise a Federal question. Apparently the theory is that the utility has contracted to charge either the rate specified in the original contract or such other rate as the Commission may fix. For the purposes of this argument, the Commission regards the terms of the Public Service Commissions Law as having been read into the contract to the extent, but only to the extent, that they give either the City or the utility the right of applying to the Commission for a change of rate. The argument is that any rate, however confiscatory, fixed by the Commission is the "contract rate," of which the utility may not complain.

No such meaning may properly be ascribed to the language of this Court in the *Henderson* case, and the contrary has been more recently directly decided. *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway*, 273 U. S. 625. The plaintiff in that case was an existing railway company operating under certain ordinances which limited it to a fare of five cents. Later, in 1921, the State of Minnesota passed a law providing for Commission regulation, which gave existing street railway companies the right, if they so elected, to come in under its terms. The plaintiff executed and filed a "consent and declaration," in which (according to the copy thereof printed in the transcript of record in that

case) it "declares that it desires that each of the grants contained in [the ordinances under which it had been operating] "shall become an indeterminate permit under the provisions of Chapter (fol. 22) 278 of the Laws of Minnesota for 1921 (Senate File No. 687), and consents that the terms of said Chapter 278 shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said The Duluth Street Railway Company." The filing of such consent and declaration gave the company the right, in the language of this Court (273 U. S., p. 626), "to apply to the above mentioned Commission to fix the rates of fare to be charged in place of the five cents to which it had been limited before it came in under the Act." It did apply to the Commission for an increased fare, and after hearing the Commission fixed six cents, based on a 7½ per cent. return on the value of the plaintiff's property used and usable in street car service, as the fare to be charged. The plaintiff thereafter filed a bill to enjoin the Commission and the City from enforcing the order for the six-cent fare, on the ground that it was confiscatory and in violation of the Fourteenth Amendment. The District Court granted the injunction and this Court affirmed that decision.

In the brief of the City of Duluth in that case exactly the same argument was made which is embodied in the Commission's brief herein. The City argued that the original franchise was in terms a contract and had been so determined by the Minnesota Supreme Court in many cases. It contended that that old franchise was not annulled by the Minnesota Commission Law of 1921, but was "still in full force as a contract except only as

expressly modified by the terms of the Act," and cited Section 8 of the 1921 Law of Minnesota, which read as follows:

> "The rates which the street railway is authorized to charge and collect under the existing franchise shall be and remain the authorized and lawful charge *until a rate is fixed* by the Commission *under the provisions of this Act* * * * and thereafter the Commission may, on its own initiative, and shall, upon application of the city or street railway, from time to time make such investigation as to any change in property value or cost of service as may be reasonably necessary, and after a full hearing, as herein provided, make such order confirming existing rates or changing rates as may be just to properly regulate rates of fare hereunder."

The express reference in Section 8 above quoted to the continuance of existing franchise rates until modified by the Commission gave far greater support to the argument now advanced by the Transit Commission than do the statutes of New York here involved. The City of Duluth pointed out that the 1921 Act had been passed at the instance of utility companies as a means of escape from fixed franchise rates, and argued—

> "Under all these circumstances, and in view of these stipulations, it would seem futile for the Duluth Street Railway Company to claim that the Brooks-Coleman Act [the Act of 1921], thus modifying its existing franchise, is not also, as that was (City of Duluth v. Street Railway, 137 Minn. 286) a contract in the full acceptance of the term, limiting its rights, and granting rights to the adverse party the City of Duluth. If so, it cannot be allowed to accept the benefits and

> repudiate its obligations; nor to deny to its adverse party, the City of Duluth, the rights therein expressly covenanted, one of which was the right to have reviewed by appeal, if taken by the City within thirty days (as was here done), any order fixing rates made by the Commission; whereas under the facts, it is seen that the rights of the City of Duluth so asserted have been repudiated and blocked by the proceedings here taken by the plaintiff in the Federal Court."

The City's brief referred to and paraphrased the language of this Court in the *Henderson Water Company* case and therefrom argued in effect that the rate fixed by the Commission was as much a contract rate as the rate fixed in the original franchise and that "no constitutional right of the Duluth Street Railway Company to be protected against confiscation could exist under such circumstances, for the method of fixing the fare, including the necessary delays in so doing, were matters of express contract binding upon it."

This contention was summarily dismissed by this Court, by Mr. Justice Holmes, in the following language (pp. 628-629):

> "The argument that the plaintiff is barred by contract needs but a word. We will assume for the purposes of decision that the plaintiff by coming in under the State law made a contract, and as part of it adopted the statutory method of getting its rates changed. But it would be extravagant to say that it did more than adopt that method in its general character and with its ordinary incidents. If apart from the supposed contract a party would have been entitled to go to the Court of the United States at the stage when the plaintiff went there, no reasonable interpreta-

> tion of the contract forbade the plaintiff to go, and there is no need to consider whether the contract could have forbidden it if it had tried."

A variant of this argument was urged in *Denney* v. *Pacific Telephone & Telegraph Co.*, 276 U. S. 97. There the company had contracted with the City of Seattle as to telephone rates. Subsequently it had applied to the Commission and procured an increase. After the interval of some years it again applied to the Commission for an increase which was denied, and it brought this suit. In the Supreme Court the Commission contended that the rates granted by its prior order must be deemed inserted in the contract, until changed by the Commission, and "regarded as contractual franchise rates and, therefore, they cannot be confiscatory in a constitutional sense." This Court, in an opinion by Mr. Justice McReynolds, wholly rejected that contention.

THIRD: The action of the Transit Commission was State action enforcing the five-cent fare against the plaintiff. The plaintiff has complied with all the procedural requirements of the Public Service Commissions Law and its suit in the Federal Courts is not premature.

The arguments in the briefs of the Transit Commission and the City that there has been no State action because the contracts bound the plaintiff to a five-cent fare have been dealt with in Point Second of this brief. The points of the Transit Commission to the effect that no constitutional right of the plaintiff was violated by the refusal of the Commission to exercise its functions under the Public Service Commissions Law, however, wholly misconceive the argument of the plaintiff based upon that law. The plaintiff does not base this suit merely upon a "statutory right" (see Commission's Brief, pp. 112-113). It stands upon a right under the Federal Constitution to be protected against confiscation, which right it has unless it has bargained it away. The plaintiff's primary reliance upon the Public Service Commissions Law is because it enacted a legislative policy which precluded the making of any such contract, and the Commission concedes (Brief, p. 112) that "of course, if the plaintiff were not under contract concerning the rate to be charged, an entirely different question would arise, because there its right to a compensatory rate would rest upon the Constitution *regardless* of any contract." This exactly states the plaintiff's situation according to our view of the case.

The contention to which this point of our brief is addressed is that this controversy had not reached a justiciable stage. That contention is not raised by the City, but only by the Transit Commission.

The plaintiff, not having contracted away its right to a compensatory fare, was entitled to invoke the protection of the Fourteenth Amendment against confiscation by State action. The State of New York had delegated the function of fixing rates to the Public Service Commission or its successor, the Transit Commission. Action by that body in enforcing against the plaintiff a non-compensatory fare, therefore, would constitute State action upon which the plaintiff might base a suit in the Federal Courts for redress. The State of New York in the Public Service Commissions Law established certain procedural requirements through which the question of the reasonableness of a rate might be raised for determination by the regulatory body. But no such questions as have arisen in other cases in this Court, relating to the reasonableness of the procedural methods required by the statute, arise here. The plaintiff has complied with the statutory procedure. Nor does there arise the sometimes litigated question whether the plaintiff is entitled to relief against daily confiscation during the period that must necessarily elapse under some statutes of other States before the rate-making process is complete. The plaintiff, as the statutory court expressly found, here has done everything that it could do under the Public Service Commissions Law to obtain a review of the fare by the regulatory body and has exhausted its remedies within the State.

The Public Service Commissions Law prescribed two methods by which a utility might raise the question of the

reasonableness of its rates. One method was a proceeding brought under Section 49, which has already been quoted. The other was embodied in Section 29. That section provides as follows:

> "§29. Changes in schedule; notice required; power of suspension by the commission. Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier. Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the commission shall have and it is hereby given authority, either upon complaint or upon its own initiative without com-

plaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation or practice, as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation or practice had become effective. Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. The commission may as authorized by subdivision one of section forty-nine establish temporary rates for any period of suspension under this section. At any hearing involving a rate the burden of proof to show that the change in rate if proposed by the common carrier, or that the existing rate, if on motion of the commission or in a complaint filed with the commission it is proposed to reduce the rate, is just and reasonable shall be upon the common carrier; and the com-

> mission may give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

The effect of these provisions was construed and applied by the New York Court of Appeals with respect to the similar provisions contained in subdivision 12 of Section 66 of the Public Service Commissions Law relating to the rates of gas and electrical corporations in *Town of North Hempstead* v. *Public Service Corporation of Long Island*, 231 N. Y. 447. In that case a gas corporation which had a franchise contract with municipal authorities to use the streets of the town on condition that a certain maximum rate should be charged to consumers, filed a schedule specifying an increased rate pursuant to subdivision 12 of Section 66 in advance of an order from the Public Service Commission determining and prescribing that such increased rate was just and reasonable. The town brought an action to enjoin the company from so increasing its rates and the determination of its right to do so was certified to the Court of Appeals. The contract embodied in the franchise contract was made subsequent to the passage of the Public Service Commissions Law. The Court of Appeals, by Judge Pound, quoting subdivision 12 of Section 66, said (p. 450):

> "These provisions were in force when the plaintiff gave its consent to the defendant to maintain and operate its gas mains within the town; entered by implication into the terms of such consent; formed part of its obligation; and were notice to the town that the consent was coupled with the provision of the statute that the defendant was empowered to abrogate it as to the rates

stipulated therein and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service (Public Service Commissions Law, §65, subd. 1) on thirty days' notice to the commission and publication for thirty days as required by order of the commission. (*Village of South Glens Falls* v. *Public Service Commission*, 225 N. Y. 216; *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, 361; *Public Service Commission* v. *Iroquois Natural Gas Co.*, 184 App. Div. 285; affirmed, without opinion, 226 N. Y. 580; *People ex rel. New York Steam Co.* v. *Straus*, 186 App. Div. 787, 805; affirmed, without opinion, 226 N. Y. 704.)

"After rates are established by the filing of schedules, a review thereof may be had on complaint under Public Service Commissions Law (§§71, 72) and the commission will then determine and fix such prices as will in its judgment be adequate, just and reasonable.

"This method of increasing rates without first obtaining an adjudication as to their reasonableness may appear defective and illogical, but no constitutional limitation on legislative power interdicts it and no exception in favor of rates stipulated in a municipal consent granted subsequent to the enactment of the Public Service Commissions Law can be read into it without doing violence to the plain language of the statute."

This case was followed and approved by the Court of Appeals in *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146.

Section 29 of the Public Service Commissions Law is in every substantial respect the same in its procedural provisions as subdivision 12 of Section 66. It provided

a method by which the utility might initiate consideration of the question of its rates by its own action in filing a schedule of new rates. The Commission was given authority, on complaint or on its own initiative, to enter upon a hearing concerning the propriety of the rate and pending such hearing and decision thereon to suspend its operation for a stated period. If the Commission rejects the new schedules filed by the utility and refuses to allow them, there can be no question but that State action enforcing the old rate has been taken. *Denney* v. *Pacific Tel. & Tel. Co.*, 276 U. S. 97; *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Augusta-Aiken Ry. & Elec. Corp.* v. *R. R. Comm. of S. C.*, 281 Fed. 977 (C. C. A., 4th).

Nor can there be any question that in this case the Transit Commission did reject the increased rates filed by the plaintiff. The defendants' contention on this point is that the formal rejection took place after the plaintiff had instituted its suit in the Federal Courts. From this alleged circumstance the assertion is made that this suit was premature.

As a matter of fact, quite aside from the action of the Transit Commission on the plaintiff's application under Section 29 in February, 1928, there had already been State action enforcing the five-cent fare. The effect of Section 28 of the Public Service Commissions Law requiring every common carrier to file with the Commission schedules showing its rates, fares and charges, and the filing of the five-cent fare from time to time pursuant thereto, itself constituted a legislative imposition of that fare. Moreover, as to a substantial part of the elevated lines, the five-cent fare was imposed

by the direct statutory requirement of Chapter 743 of the Laws of 1894, and it may be observed that the plaintiff's first cause of action is directed solely against that State action. The denial by the Commission of the plaintiff's applications in 1920 and 1922 constituted a fixation by the Commission of the five-cent fare as the rate for the future and hence was legislative action. The effect of the Commission's adverse action on plaintiff's new schedules filed under Section 29 was to compel plaintiff to continue the five-cent fare previously fixed. *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 416.

The assertion of the Transit Commission that such adverse action had not been taken prior to the bringing of this suit is utterly refuted by the facts established in this record. In every substantial respect, the Transit Commission had rejected plaintiff's filed rates several days before the complaint herein was filed and nothing remained to be done but the mere formality of evidencing by a formal order a decision already made.

The plaintiff's schedules establishing a seven-cent fare on each the elevated and subway lines and its petition asking authority under Section 29 to place the increased fare in effect on less than thirty days' notice were filed with the Commission on February 1st (R. vol. I, pp. 122-128; vol. II, pp. 928-980). Immediately after the filing of these schedules and on February 1st and 2nd, the Mayor of the City announced through the public press that the City would fight the increased fare "to the last ditch" and would prevent it (R. vol. I, p. 33; vol. II, p. 884; vol. II, pp. 1114-1118).

Beginning on February 2nd, and while the plaintiff's application for the right to put the new rates into effect

within five days was before the Transit Commission, its members began to spend a large part of each day in secret conferences with those who opposed the right to collect a seven-cent fare (R. vol. II, p. 790). On February 6th, after conferences with representatives of the Transit Commission, the Corporation Counsel for the City of New York announced:

> "We have fully determined what steps the city will take. They will be such as to protect the interests of the City of New York and the car riders and to maintain the five-cent fare. I am positive that the attempt of the Interborough to raise the fare will be prevented. The City will move at an opportune time and that will be in a short period" (R. vol. I, p. 33; vol. II, pp. 1114-1118).

On February 8th the general counsel of the plaintiff sent a letter to the chairman of the Transit Commission (R. vol. I, pp. 129-131; vol. II, pp. 1254-1256; vol. III, pp. 1778-1791) in which, referring to the provisions of Section 29, he urged the Commission to consider the plaintiff's application on the merits, expressed the plaintiff's willingness to appear before the Commission and support with proof the allegations of its petition, and also notified the Commission that if it declined to take jurisdiction on the merits, but continued to insist that the plaintiff was bound by contract to a five-cent fare, the plaintiff would have no other recourse than to present that question for a judicial determination. This letter was never answered or acknowledged (R. vol. II, p. 791).

On February 10th a series of belligerent public announcements began to emanate from the Transit Commission and its special counsel. On that date Mr. Un-

termyer wrote to the plaintiff in part as follows (R. vol. I, p. 89):

> "*I am instructed by the Transit Commission* to advise you that it protests and denies your right to withdraw from the funds in your hands as a result of joint operation any money whatever for counsel fees, experts, printing or other expenses in any way connected with the efforts of the company to secure an increased fare, and that the directors will be held personally liable for any such diversion of the funds of the company."

The Commission's action in so instructing its counsel necessarily implied a determination by it that the plaintiff must not charge a fare in excess of five cents.

It may be said parenthetically as to this matter that the plaintiff was charging its expenses in the fare matter, as the Commission was duly advised by letter, to an *operating account* (*suspense*) as the uniform system of accounts prescribed by the Commission in its regulatory capacity required and that the carrying of such expense to that account in no way determined or prejudiced any claim which the City or Commission might make as to the ultimate allowance or disallowance of these expense items in determining the amount of rental payable to the City under Contract No. 3.

On Sunday morning, February 12th, Mr. Untermyer, special counsel to the Transit Commission, issued a statement widely published in the newspapers as follows (R. vol. I, p. 92):

> "The contract has for years been flagrantly violated in letter and spirit in almost every line, and yet such have been the skill and thoroughness of the company propaganda, conducted for

years with *money literally picked from the City's pockets*, that, strangely enough, there is today a considerable body of *well-meaning people* defending or excusing the Interborough *who if they knew the facts would be more disposed to tar and feather them*. I have insisted from the beginning that *we shall never get decent service until the properties are taken out of their hands*.

"So accustomed have the Interborough people become to *rifling the City treasury* to carry on their dishonest propaganda that *they are actually at this moment dipping into the City's funds* in the custody of the Company to pay their counsel, experts and other expenses for the present application for a 7-cent fare. Hard as it is to believe, it is true."

Coincidentally with this communication from the spokesman for the Transit Commission, the public prints on the same day carried an announcement on the part of the Mayor of the City of New York that he planned "to seize the Interborough subways on the ground that the Company has defaulted under the terms of the contract between the Company and the City"; that this had been determined upon at a conference the preceding Friday attended by Mr. Untermyer, Mr. Delaney, Chairman of the Board of Transportation, and Mr. Fullen, counsel for the Board (R. vol. II, p. 1117).

The Commission had met and determined upon rejection of the plaintiff's application. Commissioner Godley was on February 10th, which was Friday, designated to prepare over the week-end an opinion to embody and carry out such determination (R. vol. II, p. 886). The Transit Commission was to meet on Tuesday morning, February 14th (Monday, February 13th, being a holiday), to give formal announcement of its action upon

the plaintiff's application. It did actually meet on that day and "rendered its decision accompanied by an opinion by Commissioner Godley, which was concurred in by the other Commissioners, and which had been prepared over the week-end for the consideration of and discussion by the Commission." The affidavit of chief counsel for the Commission (Mr. Lewis) states (R. vol. II, p. 879) that—

> "On February 14, 1928, the Transit Commission, *acting in its capacity as a regulatory body*, held a special meeting, and adopted an opinion in Case No. 2897 (a true copy of which is hereto annexed, marked Schedule '1,' and made a part hereof), an order rejecting as unlawful the tariff schedule sheets filed by plaintiff on February 1, 1928, and a resolution directing Counsel to the Commission to bring a summary proceeding under Section 57 of the Public Service Commission Law in order to have stopped and prevented the *violation of law* which would have been involved had plaintiff charged *a rate higher than that allowed by law* or than that shown in its tariff schedules on file and in effect."

The "law" which the Commission asserted, prohibited a fare in excess of five cents was manifestly operative before February 14, 1928.

The plaintiff had that same morning (February 14th) brought this suit at 9.20 and served its process before noon. Later that same morning the papers in three actions in the New York State Courts against the plaintiff were submitted to the Court and the plaintiff was served with process on that day. One of these actions was a summary proceeding instituted by the Transit Commission under Section 57 of the Public Service Com-

mission Law to punish the Interborough Company for violation of law. Another was by the City of New York to enforce against the plaintiff the fare provision of Contract No. 3. Still another was by the Transit Commission, on behalf of the City of New York, for the same purpose (R. vol. II, pp. 1390, 1392, 1393, 1401).

The Commission's argument (Brief, pp. 86-93), that those actions were merely judicial proceedings by one party to a contract to secure its enforcement, is quite beside the point. The attempted institution of those actions evidence the prior adverse determination of the Commission upon the plaintiff's application. That determination was State action, which had taken place before this suit in the Federal Court was instituted. That the determination did not take place until the entry by the Commission of its formal order may not be asserted with any regard to the realities of this case.

The papers in these State Court actions show with great clearness upon what matters the Transit Commission was engaged between February 1st and 14th, during which period the plaintiff was urging it to consider on the merits its application for an increased fare. The papers in those actions are most voluminous. It necessarily required several days to prepare them. *They were actually verified by the City of New York on Saturday, February 11th, three days before the plaintiff commenced this action, and the summons issued out of the State Supreme Court was dated on that day.* Mr. Lewis, chief counsel for the Transit Commission, admits that "the Commission had determined on the state suits *long before this suit* [in the Federal Court] was brought or suggested" (R. vol. II, pp. 881-882). Mr.

Untermyer admitted in open court, before District Judge Bondy, that *within three days* from the filing of the plaintiff's schedules and its application of February 1st to the Transit Commission, the papers were prepared and ready for presentation to the State Court in the suits brought by the Transit Commission and the Corporation Counsel to compel observance of the five-cent fare as being imposed by "law" and "statute" (R. vol. II, pp. 791-792). And Mr. Untermyer in his affidavit (R. vol. II, p. 885) avers that "the fact that such a suit was impending and that the *Transit Commission* had also given *instructions* to its counsel was widely published in all the newspapers of the City for *at least one week prior* to the beginning of this action."

It thus appears in this record, from statements made by the representatives of the defendants themselves, that by February 3rd or 4th the Transit Commission, in complete co-operation with the City, had determined to reject appellant's filed schedules, to deny its application for an increased fare and to compel the continuance of the five-cent fare by every means at their command. To carry out such determination, the Commission itself gave instructions to its counsel to prepare and secure all necessary legal documents and process, in collaboration with the City, in the meantime thwarting and obstructing the plaintiff in its orderly course to secure a hearing on the merits. Nothing remained to be done on February 14th but to enter a formal order embodying the decision already made.

The action of the Transit Commission in February, 1928, was the same as that which it (or its predecessor) took with respect to plaintiff's earlier applications for an increased fare. In 1920 the plaintiff made complaint to

the Commission that the five-cent fare "is insufficient to yield reasonable compensation for the service rendered by it in the operation of the subway and is unjust and unreasonable," and applied "for a hearing and determination under Section 49 of the Public Service Commission Law as to a just and reasonable rate." The Commission dismissed the complaint and denied the petition "for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3 referred to in said complaint" (R. vol. II, p. 1024). Again, in 1922, the plaintiff similarly applied for an increase of fare both on the elevated lines and the subway lines. The application was again denied for lack of jurisdiction.

Thus, when the Transit Commission in February, 1928, met the application which the plaintiff made through the invocation of the procedure of Section 29 with pre-judgment, denial of any relief and the institution of actions in the State Courts to enforce the fare and restrain the charging of a higher fare as a "violation of law," it was following the same course which it had adopted as its policy eight years before. The plaintiff's applications for consideration by the State regulatory body of the question of the reasonableness of the subway and elevated fares have always been met by action to enforce the five-cent fare.

Indeed, the above argument showing action by the State, through the Transit Commission, on plaintiff's application in 1928 is virtually conceded in the Commission's brief. The Commission states (Brief, pp. 17-19) that by the Public Service Commissions Law "two methods are provided by which a carrier may ini-

tiate proceedings for an increased rate," first, under Section 49, and second, under Section 29. In discussing the method under Section 29, the Commission points out that the propriety of the new rate filed thereunder may be capable of determination within the period of thirty days, and that accordingly "the Commission is given authority, without suspending the rate, to take the same action that it might take under Section 49 after the rate had become effective." Upon this exposition of the two methods of raising the question of the reasonableness of a rate, above referred to, the Commission (Brief, pp. 119-120) shows its "denial of relief" upon applications by the plaintiff under both sections. It says:

> "Under Section 49 an increase in the contractual rate could not take effect except with the *approval* of the Commission; under Section 29 (assuming that Section to be applicable to such a case) the increase could not take effect without the *concurrence of the* Commission. Under Section 49 an increase could not take effect *unless* the Commission said 'Yes.' Under Section 29 the increase could not take effect *if* the Commission said 'No.' In 1920 and 1922 on the plaintiff's application under Section 49 the Commission refused to say 'Yes' and in 1928 on the plaintiff's application under Section 29 the Commission unequivocally said *'No.'*" (Italics in original.)

To pretend, therefore, that the plaintiff has not exhausted its remedies under the State law, but might have had relief by further delay or supplication, is the merest sophistry. To have made further motions looking to consideration of the case by the Transit Commission would have been an utterly vain thing. As soon as

the plaintiff knew what was the fact, that the Commission had determined upon rejection of its application and was taking affirmative steps to enforce the five-cent fare, it was entitled to go to the Federal Court for protection against confiscation.

This Court has upheld recourse by utilities to the Federal Courts where the facts showing State action and exhaustion of State remedies were far less clear. In *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, this Court held that the action in the Federal Court should not be defeated by the objection that the Public Service Commission had not completed its investigation of the matter. This Court, by Mr. Justice Sutherland, said (pp. 591-592):

> "It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceeding, the commission for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons but with a hand quick to preserve it from confiscation. *Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them;* and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to

> await a decision of the rate-making tribunal before applying to a Federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 293; *Prendergast* v. *New York Teleph. Co.*, 262 U. S. 43, 49; *Pacific Tel. Co.* v. *Kuykendall*, *supra*, p. 204; and *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 415."

In *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway*, 273 U. S. 625, the facts of which have already been stated, the Minnesota Commission granted an increase of fare from five cents to six cents, but the company was not satisfied. The statute gave a right of appeal to the District Court of the county to be tried by three judges. The company brought its suit to enjoin the Commission from enforcing this rate before it had exhausted the statutory remedy of appeal. The City and the Commission contended not only that the company was bound on principles of contract (which contention we have already discussed), but that its suit was premature. As to this contention this Court, by Mr. Justice Holmes, said (p. 628):

> "But as against these considerations it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District

Court of the United States. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U. S. 196; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290."

In *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, this Court held that a telephone company complaining that rates fixed by the Public Service Commission of New York were confiscatory need not apply to it for rehearing, or apply to the State Courts for review by certiorari, before resorting to the Federal Court for an injunction, and said by Mr. Justice Sanford (pp. 48, 49):

> "Upon the making by the Commission of the orders in question the proceedings had reached the judicial stage entitling the Company to resort to the court for relief. *Bacon* v. *Rutland Railroad*, 232 U. S. 134, 137; distinguishing *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229, in which an appeal had not been taken to the highest tribunal vested with the final legislative authority of the State. Here the Commission is vested with the final legislative authority of the State in the rate-making process; the authority exercised by the state courts upon a review by certiorari (*People* v. *Wilcox*, 194 N. Y. 383), being purely judicial and having no legislative character. Laws, New York, 1920, c. 925, Sections 1304, 1305, pp. 437, 438.
>
> "It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commission Law any person interested in an order of the Commission has the right to apply for a rehearing, the Commission is not required to grant such rehearing unless in its judgment sufficient reason therefore appear; • • • Here the Commission did not suggest

> in its answer that it perceived any ground upon which it would have granted a rehearing, if an application had been made, but, on the contrary, maintained the correctness of its orders in all respects. Manifestly under such circumstances the injunction should not have been denied merely because application had not been made to the Commission for a rehearing."

Other decisions of this Court to the same effect as the three from which we have quoted above are *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290; *Banton* v. *Belt Line R. Corp.*, 268 U. S. 413; and *Denney* v. *Pacific Telephone & Telegraph Co.*, 276 U. S. 97. In *Pacific Telephone Co.* v. *Kuykendall*, 265 U. S. 196, this Court, through Mr. Chief Justice Taft, held in effect that the only requirement before resort to the Federal Court was that "it [the utility] has done all it could to get relief and cannot get it" (p. 204). The opinion continued (pp. 204-205):

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 293. In such a case the *Prentis Case* has no application. *Love* v. *Atchison, etc., Ry. Co.*, 185 Fed. 321, 324, 325."

Under the Public Service Commission Law the determination or action of the Transit Commission with respect to rates was the action of the State. There can be no question that it has rejected the rates filed in plaintiff's new schedules and denied its application for the increase therein proposed.

FOURTH: The five-cent fare yields such a low return as to be confiscatory.

The complaint alleges and the proof submitted shows that the value of the property operated by the plaintiff and devoted to the public service was, for the fiscal year ended June 30, 1927, $898,793,648. The net earnings representing the return,—that is, the income, after deduction of operating expenses but before payment of preferential charges under Subway Contract No. 3,—amounted in the same year to $22,622,761.73. This figure of net earnings is made up of $3,168,788.28 for the elevated lines, and $19,453,973.45 for the subways. On this basis the return in 1927 on the elevated lines was 1.52 per cent., on the subways 2.82 per cent., and on the combined system 2.52 per cent. (R. vol. II, pp. 846, 848, 850). Manifestly this is not a reasonable return on the value of the property used in the public service.

The defendants have challenged the use of the experience in 1927 as a test, asserting that the strike, which occurred during that year, rendered the result abnormal and resulted in a decreased revenue. But on this same basis in 1926, the most prosperous year the Company has had since operation under Contract No. 3 began, the return on the elevated lines was 1.89 per cent. (R. vol. II, p. 846), on the subways 2.88 per cent., and on the combined system 2.65 per cent. (R. vol. II, pp. 848, 850). There is summarized in the record (R. vol. II, p. 939), and in the Appendix (at page 252), the results of identical calculations for prior years. They show a wholly inadequate return, the highest being 2.38 per cent. in 1922.

The arguments in the briefs of the Transit Commission and the City present two major contentions in opposition to the plaintiff's position as above stated. They contend, first, that the plaintiff is entitled to include in the rate base upon which the return is to be calculated, not the value of the property used in the public service, but only the value of the plaintiff's present interest therein and, second, that the plaintiff is prosperous. The propositions subsidiary to the first major contention are that all city-owned property should be excluded from the rate base, and that, even as to property owned by the plaintiff, the fact that the City is entitled under the terms of Contract No. 3 and the Elevated Extension Certificate to recapture much of that property should govern the valuation of the plaintiff's interest therein; in connection with the former proposition the defendants invoke a supposed analogy to the basis of compensation in condemnation proceedings.

Unsound as we believe the defendants' position to be, we shall hereafter demonstrate that even if the rate base were confined to property provided by the plaintiff, or even to property owned by the plaintiff, the return received upon that property is not compensatory.

In connection with the second major contention, the City emphasizes the terms of Contract No. 3 providing for interest to the plaintiff upon the amount of money invested by it in the subways and elevated lines, and the Transit Commission suggests that the usual basis of an 8 per cent. return should not apply to the plaintiff because of the preferential character of certain of its returns under Contract No. 3. It actually inserts in its brief (page 200) data not contained in the record purporting to show the rate of return on the preferred stocks

of certain prominent industrials and utilities, without in any way indicating how many times the preferred dividend requirements were earned by those corporations.

Besides these major contentions, the City criticizes the inclusion of certain specific items in the rate base. We do not deem it necessary to argue here the propriety of the inclusion of these items. The order appealed from provides for a trial before the Special Master, and all such controverted matters may be litigated before him through testimony and cross-examination rather than by conflicting affidavits. It is sufficient here to say that if all these specific items were excluded from the rate base, the net earnings would still not show a compensatory return.

The City argues (Brief, p. 154) that "the Interborough Company has no property in subways and no interest in the cost of reproduction thereof," and that "so far as the City of New York is concerned, its subways could be operated free of charges as are its bridges"; that the City could make such charges as it sees fit and support its subways partly from charges and partly from taxation. But the City is not operating the properties. The City has leased them to the plaintiff for operation by it. Moreover, as we have above pointed out, there is no statutory authority for the City itself to operate rapid transit railroads and support an operating deficit by taxation.

A further glaring inaccuracy in the City's brief may here be noted. It is said (page 154) that the plaintiff has no property in the subways, save only the equipment furnished under Contracts Nos. 1 and 2, and that "even such equipment was paid for by the City of New York, as presently will appear." It "appears," however, from

the provision of the contract quoted on page 156, that the sums to be paid by the City "do not include the cost of equipment," but only "a consideration satisfactory to the Contractor for its obligation to provide the equipment which, when provided, shall be the property of the Contractor." Of course, the equipment was paid for by the plaintiff, which issued its own bonds to finance the cost thereof. Under Contracts Nos. 1 and 2 the equipment was to be the property of the Contractor, and it was expressly provided that at the termination of the lease "the City shall buy and the Contractor shall sell" all the property of the contractor employed in and about the equipment, maintenance and operation of the railroad, the right of the City so to buy being protected by a lien upon the equipment.

The argument of the Transit Commission is predicated upon the proposition stated in the third heading of Part 3 of its brief (p. 192) that "the value upon which the plaintiff is entitled to a fair rate is determined by the character of its interest in the property, and that value is limited by the provisions of contract 3 and of the certificate." It is pointed out that these documents contain provisions for recapture at the actual cost of the lines plus 15 per cent. after ten years, which have now expired, and that the present value of the lease is necessarily very much less than the recapture price by reason of the provisions of the contract that out of the sums to be retained by the plaintiff as interest, it is required to set aside amounts sufficient, with interest and accretions, to amortize within the term of the lease its contribution toward the cost of construction and the cost of equipment furnished under Contract No. 3.

The application which the Transit Commission makes of this circumstance appears from the table (brief, pp.

197-198), in which the property provided by the Company under Contracts Nos. 1 and 2 is stated to be taken at present value less 20 per cent.; in other words, that one-fifth of the term of the lease having expired, one-fifth of the present value should be deducted from the amount upon which the return is to be calculated. The logical conclusion of this theory is that when the lease has only five more years to run, the plaintiff, though operating property devoted to the public service, would be entitled to include only 10 per cent. of its then value in the rate base. On such a basis one cent might be a fare which would yield a reasonable return. Of course this is absurd.

Much the same contention was rejected by this Court in *City and County of Denver* v. *Denver Union Water Co.*, 246 U. S. 178. In that case the franchise of the utility and its right to use the public streets had expired. The company continued, under what amounted to a day by day license, to furnish public service, and the city passed an ordinance fixing rate to be charged. The company brought suit claiming confiscation and the city argued (p. 184) "that the value to the company of the property under these circumstances is what it would bring for some other use in case the city should build its own plant—in other words, as to a large part of the property, 'junk value'."

This Court upheld the company's right to a rate based upon the present market value as to its land, and reproduction costs, less depreciation, as to its structures, and said (p. 191):

> "It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having

the value of property in use, but is to be reckoned with on the basis of its 'junk value.' *Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance.* The reason is not obscure; the cost and detriment to a property owner attributable to the use of his property by the public, and the value of the service rendered by the property to the public, are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue. The cost of the service includes the use of the plant, but, ordinarily, not its destruction, except through the slow processes of wear and tear and obsolescence, for which graduated depreciation allowances are made. *The whole calculation is a matter of income, not capital, accounting;* and the cost and value of the use of a given property for a stated period is the same whether the use is to be continued after the expiration of the period or not. If the period is extended, compensation for the use is extended proportionately."

The analogy from condemnation cases is wholly inapposite. When property is taken under eminent domain, the award is in gross for the fee value. If the property is under lease, that value is apportioned between the lessor and the lessee as their respective interests may appear. But it is the fee value of the property which controls. *Matter of Pier 39*, 62 N. Y. App. Div. 271, affd. 168 N. Y. 254; *Matter of Daly*, 29 N. Y. App. Div. 286; *Taylor* v. *State*, 124 N. Y. Supp. 818, 823; *Cornell-Andrews Smelting Co.* v. *Boston etc. R. Com-*

pany, 209 Mass. 298; *Providence etc. Steamboat Co. v. Fall River*, 187 Mass. 45; *Edmands v. Boston*, 108 Mass. 535.

In a rate case, however,—where, as this Court said in the passage above quoted from the *Denver Water Company* case, "the calculation is a matter of income, not capital, accounting," and the question to be determined is the reasonable return upon operation of the property,—it is the operator who has the sole interest in that return. While the lease persists, the obligation to operate the property for the public benefit is his, and to him also must belong the right to a reasonable return thereon.

The only case in this Court cited by the Transit Commission to support the supposed analogy to cases of eminent domain is *Willcox v. Consolidated Gas Co.*, 212 U. S. 19. The decision in that case is wholly inapposite. The Gas Company owned absolutely all the tangible property devoted to the public service, and hence the question raised in the brief of the Transit Commission did not and could not arise. Any appearance of applicability of the passage from the opinion quoted in the brief is destroyed by the sentence immediately following, which is not quoted, as follows:

> "There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

San Diego Water Co. v. City of San Diego, 118 Cal. 556, is likewise inapposite, and for the same reason. The Company there owned absolutely all of the property, and the Court allowed a return based upon its replacement cost.

Plaintiff is entitled to a reasonable return upon all of the property used in the public service.

In *Smyth* v. *Ames*, 169 U. S. 466, 526, this Court thus tersely stated the test:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."

In *Board of Commissioners* v. *New York Telephone Co.*, 271 U. S. 23, 31, this Court said that "the constitutional protection against confiscation does not depend on the source of the money used to purchase the property," and that "it is enough that it is used to render the service."

And in a very recent case, *McCardle* v. *Indianapolis Water Company*, 272 U. S. 400, the Court said:

> "There is to be ascertained the value of the plant used to give the service and not the estimated cost of a different plant. Save except under exceptional circumstances the court is not required to enter upon a comparison of the merits of different systems. Such an inquiry would lead to collateral issues and investigations, having only remote bearing upon the fact to be found, viz., the value of the property devoted to the service of the public."

In New York, Section 49 of the Public Service Commissions Law expressly provides that

> "the commission shall with due regard among other things to a reasonable average return upon

> the value of the property *actually used* in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rate * * *."

And indeed the City's brief can give no reason for its assertion (page 113) that this basis is inapplicable other than to say "manifestly."

Houston v. *Southwestern Bell Telephone Company*, 259 U. S. 318, and *Southwestern Bell Telephone Company* v. *Public Service Commission*, 262 U. S. 276, in fact involved leased property. The circumstance that in this case the lessor is the City of New York makes no difference. The Court of Appeals of New York regards the City as a "railroad corporation so far as the construction, operation and leasing [of the subway] is concerned." *Matter of Rapid Transit R. R. Commissioners*, 197 N. Y. 81, 90.

If the present value of the property being devoted to the public service is nearly $800,000,000, then the Company is entitled to a return upon all of that property. What it does, or has to do, with the revenue so received is not involved in the rate-making process. If its operating expenses are heavy, they must nevertheless be met. If its obligation under the lease of the Manhattan Railway is excessive or improvident, the Company must suffer. If the rental which it has to pay to the City of New York under Contracts Nos. 1, 2 and 3 is excessive or inadvisable, it must take the consequences. If its funded indebtedness is larger than the present value of the property which secures the indebtedness, the interest charges must be met nevertheless. In other words, the Company's application is not for permission to charge a rate of fare which will enable it to pay its rental obli-

gations, interest upon its bonds and dividends on its stock. All it seeks is a fair return upon the value of the property which it uses in the public service.

This distinction was recognized by this Court in *Darnell* v. *Edwards*, 244 U. S. 564. There the operator of the railroad claimed a right to deduct as an operating expense the rental which was paid by him pursuant to the contract under which the railroad had been built. The operator had agreed to maintain and operate the road for twenty years, and it was to become the property of the lessor at the end of that term. The District Court denied the right to charge this sum for the purpose of calculating the revenue attributable as a return upon the property used in the public service. This Court said (p. 568):

> "In this court appellant insists, first, that the District Court erred in holding that he was not entitled to charge against the annual operating revenue 1/20 of the amount expended by him in the construction of the road. We are clear that this contention is untenable. In determining whether rates are confiscatory because not yielding a proper return, the basis of calculation is the fair value of the property used in the service of the public. *Smyth* v. *Ames*, 169 U. S. 466, 546; *Minnesota Rate Cases*, 230 U. S. 352, 434. The hypothetical annual payments of 1/20 of the cost of the road to Darnell were not a proper rent charge, and bore no relation to the actual value of the property. They arose out of the contractual arrangement between Darnell and the Illinois Central, and were in the nature of an amortization charge to take account of his diminishing interest in the road. But, upon that theory, the interest of the Illinois Central in-

> creased in value by as much as that of Darnell decreased. In any aspect, the transference of his interest to the Illinois Central, and any charge on that account, made by him for purposes of his own bookkeeping, had no proper relation to the question of the value of the property, and hence were of no concern to the public."

It is this confusion between the *return upon property used* and the alleged prosperity of the Company which leads the City to point out what it conceives to be the favorable provisions of Contract No. 3, and to insist that the Company is being paid in full under that contract. But that is beside the point. This action was not instituted to reform or cancel the operative provisions of Contract No. 3. It was instituted to enjoin State interference with plaintiff's constitutional right to a reasonable return upon the property devoted to public service.

But as a matter of fact the Company is not prosperous. Its power to borrow money is exhausted. Its credit is impaired (R. vol. II, p. 810). It has paid no dividends upon its stock for ten years.

The situation of the Company was described by the Special Counsel for the Commission in his Report as follows:

> "Assuming there is no recapture and that the present situation continues, *there seems no hope that the I. R. T. will be able to meet its fixed charges* and sinking fund requirements from the time it must face the competition of the new City subways and it is *more than doubtful whether it can do so before that time.*"
>
> (Report of Special Counsel, p. 79; Exhibit G, attached to affidavit of Mr. Samuel Unter-

myer, March 12, 1928; referred to R. vol. II, p. 889, and covered by Stipulation, R. vol. III, p. 2020).

And if the City's contention be correct that all of plaintiff's accrued deficits have been paid, then no income from the subway system above the amount of its preferentials will be available until the accumulated deficits in amounts due the City have been paid. Under Contract No. 3, after operating expenses and taxes have been paid, the income from the operation of the subways is to be apportioned substantially as follows, using 1927 figures:

Rental paid to the City under Contracts Nos. 1 and 2		$ 2,655,569
Company's preferential	$6,335,000	
Net allowances to Company by way of interest and amortization upon its investment under Contract No. 3	7,883,975	14,218,975
		$16,874,544

The City contends (brief, p. 158) that everything above this amount (which varies but slightly from year to year) must be paid to it until its accrued deficits have been made up. If this is so the Company would have available only about $14,218,975 a year from subway operations. Its net operating revenue from the Manhattan Division was, for the fiscal year ending June 30, 1927, $3,168,788. The total revenue from the entire system which it could apply for its own purposes would therefore be $17,387,763. But the Company's fixed

and other annual charges amounted in the year ended June 30, 1927, to $18,496,305 (R. vol. II, p. 803).

The claim of prosperity is absurd.

The figures upon every hypothesis show confiscation.

The validity of the plaintiff's assertion of confiscation very graphically appears from the table in the brief of the Transit Commission itself (pages 197, 198). Though the table purports to be based on present value, the property owned by the plaintiff under elevated certificates and the subway property provided by the plaintiff under Contract No. 3 is taken at original cost plus 15 per cent. instead of at its present value as contended by the plaintiff. The original property of the Manhattan Railway is taken at the "Commission's estimate of present value," this being, however, not the estimate made by the Commission's engineer *ante litem motam*, but an estimate made for the Commission for the purposes of this suit. From the property provided by the Company under Contracts 1 and 2 is deducted 20 [illegible] under the contention of the Transit C[illegible] which we have above noticed. *No property which was not either company-owned or company-provided, albeit now used in the public service, is included in the rate base.* Thus, taking as the rate base only the company-owned and company-provided property, with all deductions therefrom claimed by the Commission, and applying to it the entire net income, not only that derived from the company-owned and company-provided property, *but also the income derived from property expressly excluded from the rate base*, and adding to the actual income a sum of $2,000,000 which the Transit Commission asserts would have been earned by the plaintiff had not

a strike occurred upon its lines, the highest return which the Transit Commission is able to calculate upon this rate base of its own devising, is 6½ per cent.

On any admissible construction of the rate base, the return was very much less. The return was plainly confiscatory under the principles laid down by this Court in *Bluefield Waterworks and Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 692-695, in which the prior decisions cited in the Commission's brief are reviewed and distinguished.

There have been printed in the appendix (pages 251-266) tables showing the various rate bases which have been suggested by the various parties hereto and the resultant return thereon. Each table shows where like figures and calculations appear in the record. The "Company figures" are set forth in the affidavits of Mr. Henry T. Berry, its Comptroller (R. vol. II, pp. 796-816, 1075-1104, 1205-1221) and Mr. Gorsuch, its engineer (R. vol. II, pp. 841-854). The figures which are referred to as those of the Transit Commission's engineers were prepared by such engineers and introduced in evidence by Special Counsel for the Commission during the 1927 investigation conducted by the Transit Commission (R. vol. II, pp. 1090-1093). This is substantially admitted by Mr. Norman C. Hill, Chief of the Division of Valuation and Maintenance of the Transit Commission (R. vol. II, pp. 1173-1177) and he annexes to his affidavit six tables which show substantially the same figures (R. vol. II, pp. 1178-1183). The accuracy of the figures showing the amount of revenue available (except for the estimates of the result of the strike) are not challenged but are conceded by Dr. Bauer, the valuation affiant for the City (R. vol. II, p. 1049).

(1) THE TOTAL PRESENT VALUE OF ALL THE PROPERTY DEVOTED TO THE PUBLIC SERVICE.

Plaintiff alleged that the present value of all of the property devoted to the public service as of June 30, 1927, was $898,793,648 (R. vol. II, pp. 798, 846, 848, 850). This is divided as follows:

Total elevated division	$208,873,038
Total subway division	$689,920,610

These estimates are conservative. Nothing whatever is included for going value, the land as to the subways is included at original cost and as to the elevated properties at the 1921 appraisals, although since that time it has increased materially in value (R. vol. II, p. 862). Easements of light, air and access are included at actual cost and nothing is included for the value of the franchises (R. vol. I, pp. 27, 70, 81; vol. II, pp. 844, 846, 850).

The net revenue of the elevated lines in 1927 was $3,168,788, of the subways $19,453,973, and the total net revenue was $22,622,761. On this basis the return in 1927 on the elevated was 1.52 per cent., on the subway division 2.82 per cent., and on the combined system 2.52 per cent. (Table 1-A, Appendix, p. 251; R. vol. II, pp. 846, 848, 850).

On the basis of figures prepared by the Transit Commission's engineers the valuation is $831,553,648. The return from the combined properties upon that valuation was 2.72 per cent. (Table 1-B, Appendix, p. 252; R. vol. II, p. 851).

The lowest present valuation asserted by any affiant for the Commission is $734,016,000 for 1926. That is in Table 3, annexed to Mr. Hill's affidavit, and is by him entitled "On the basis of cost to reproduce new,

less depreciation" (R. vol. II, p. 1180). The 1927 valuation would be substantially the same. On this valuation the return upon the combined system would be 3.08 per cent. (Table 1-C, Appendix, p. 253; R. vol. II, p. 1180). But the straight-line method of depreciation adopted by Mr. Hill was criticized, and the method adopted by plaintiff of using an actual estimate of cost to restore the property was approved, by this Court in *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 416.

The City makes no attempt to place a present valuation upon the whole property. It does, however, attack certain items in the plaintiff's rate base. The principal items are as follows:

As to the subways and elevated extensions:

Excess cost of Belmont Tunnel	$ 5,895,174
A reduction in the Company's figure of property provided by it under Contracts 1 and 2, resulting from various deductions not clear in themselves and not consistent with each other (brief, pp. 164-165), and the effect being to reduce this item $10,000,000 below even the figure found by the Transit Commission's engineer as the "original cost" of the property	69,788,000
Company property, Contract 3	92,998,289
Company property, Elevated Certificate	14,603,969
(These deductions are made by taking cost plus 15 per cent. and subtracting the product from the Company's figures for present value. This is not a determination of the present value of the property but of what the City contends is the value of the Company's interest therein.)	
Total as to the subways and elevated extensions	$183,285,432

As to the original elevated:

Discount of bonds of predecessor corporations	$ 6,974,285
Par value of stock and bonds issued to construction contractor by predecessor corporation	5,113,309
Intangible street railway capital	14,014,000
Total as to the original elevated	$26,101,594

Thus the total of all specific deductions claimed by the City, for subway and elevated is $209,387,026. No deduction is here made for the city-provided property. The City does not controvert its present value but only asserts that it should be excluded from the rate base.

For its extreme position as to the elevated, the City refers to an affidavit (R. vol. II, p. 1057) in which it is asserted that by reason of obsolescence the present value of the old elevated system does not exceed $50,000,000. On this theory the City claims a total deduction from the Company's figure of present value of the original elevated lines of $93,556,000.

The maximum specific deductions, therefore, claimed by the City on the combined elevated and subway systems is $276,841,432. This maximum figure, deducted from $898,793,648, leaves $621,952,216 as the rate base. The combined earnings for 1927 show a return even on this basis of only 3.6 per cent. (Table 1-D, Appendix, p. 254). A similar calculation for 1926 shows a return of 3.8 per cent. (*Ibid.*, p. 255).

The confiscatory character of the five-cent fare, on the basis of present value of all the property used in the public service, is therefore manifest. On the lowest rate base suggested by the Transit Commission

(assuming all such property to be included) it is 3.08 per cent. On the lowest base suggested by the City (on the same assumption) it is 3.6 per cent.

(2) THE COST OF ALL THE PROPERTY.

But suppose the rate base were assumed, contrary to our contention, to be not the present value but simply the cost of all the property used in the public service. The Company contends that the actual investments as shown by its books for the combined system are $523,409,419. Upon that base the return in 1927 was but 4.32 per cent. (Table 2-A, Appendix, pp. 256-257; R. vol. II, pp. 852-853). The original cost of Company and City property, according to the Commission's figures, is $480,424,959 (R. vol. II, p. 854). This includes a figure for the original Manhattan Railway property of only $71,419,000. Upon even such a base the return is but 4.71 per cent. (Table 2-B, Appendix, p. 258; R. vol. II, pp. 853-854).

Even if the specific items criticized by the City, which we have discussed in the preceding subdivision, should be excluded in so far as they are applicable to a rate base calculated on cost instead of present value, the return would still be far below the measure of reasonable compensation.

The first specific item is the excess cost of the Belmont Tunnel, $5,895,174. As to the next item relating to Company property under Contracts 1 and 2, it appears that the "original cost," as found by the engineers of the Transit Commission, was $47,088,080. The lowest figure asserted by the City for this property is $37,000,000. On this basis, therefore, the maximum deduction for this item would be $10,088,080. The next

item discussed by the City (brief, p. 165), is Company property, covered by elevated certificates. The "original cost," based on the figures of the Transit Commission's engineers, is $43,903,121. The City suggests a slightly higher figure, $44,116,549. There can, hence, be no controversy as to this item. As to the original elevated, the figure of the Transit Commission's engineer for the original cost is $71,419,000. The lowest figure asserted by the City (that is, the arbitrary figure based on present value on the theory of obsolescence) is $50,000,000, making a maximum deduction for the elevated of $21,419,000.

Thus, the total deductions for which the City contends, applicable to a rate base calculated on cost of all the property, are $37,402,254. Subtracting this not from the Company's cost figure, but from the lower figure asserted by the Transit Commission's engineers, namely, $480,424,959, leaves still a rate base of $443,022,705, on which the total net revenues show a return of only 5.1 per cent. (Table 2-C, Appendix, p. 259). A similar calculation for 1926 shows a return of 5.4 per cent. (*ibid*).

(3) THE PRESENT VALUE OF THE COMPANY-PROVIDED PROPERTY.

The present value of the property owned or provided by the Company is $556,413,648 (R. vol. II, p. 1078-1079). The Transit Commission and the City suggest that the rate base be limited to this property, or to only the company-owned property, which will be considered in the next subdivision. This we deny. But, moreover, they would apply to such rate base the entire net revenues, both those derived from company-owned and com-

pany-provided property, and those derived from city-provided property. This is manifestly an inadmissible method.

If the rate base were to be the company-provided property, or the company-owned property, we submit that only the proportion of the revenues derived from those properties should be used in calculating the return.

But at least there must be deducted from the total net revenues the revenues which under Contract No. 3 are preferentially payable to the City as rental for the properties embraced in the lease contained in Contracts Nos. 1 and 2. This amounted in 1927 to $2,655,569 (R. vol. II, p. 803). There should also be deducted the amount which, but for the fact that there were accumulated deficits in the Company's preferentials, would have been payable to the City as preferential payments under Contract No. 3 for the city-provided property under that contract, since that property is excluded from the rate base. That preferential amounts to 8.76 per cent. of the City's investment. The City contends that its investment under Contract No. 3 is $139,377,007. A return of 8.76 per cent. on that sum would be $12,209,426 annually. But this is not payable until prior charges amounting in 1927, as we have shown, to at least $16,874,544 have been deducted. The total subway revenue in 1927 was only $19,453,973; so that the maximum amount which would have been payable to the City by reason of such preferential in that year was $2,579,429. The City asserts that any increase in the subway revenues will only increase the amount of the preferential payment under Contract No. 3 to the City, and consequently, for the purposes of this calculation, we use for 1927 the figure of $2,579,429.

When these amounts attributable to the excluded property aggregating $5,234,998 have been deducted from the system balance, the net return is found to be $17,387,763, which attributed to $556,413,648, is a return of 3.1 per cent. (Table 3-A, Appendix, p. 260).

The present value of the property owned or provided by the Company on the basis of the Transit Commission's engineers' figures, as of June 30, 1926, was $472,737,000. The revenue attributed to the company-provided property, upon the above method of calculation, was $18,140,027 in that year, which was a return of 3.8 per cent. (Table 3-B, Appendix, p. 261).

(4) THE PRESENT VALUE OF THE COMPANY-OWNED PROPERTY.

The present value of the company-owned property is $283,473,474 (R. vol. II, p. 1080). For the reasons considered in the preceding subdivision there must be deducted from the total revenues of 1927, in order to determine the return upon that property, at least the following:

1. Rent paid to the City under Contracts Nos. 1 and 2	$ 2,655,569
2. Rent payable to the City under Contract No. 3, as above	2,579,429
3. Interest and sinking fund obligations upon the bonds of the Company issued to pay for property provided by it under Contracts Nos. 1, 2 and 3, but title to which vested in the City	8,522,943
	$13,757,941

Deducting this sum from the total revenues of $22,622,761.73 leaves revenues of $8,864,820, which

attributed to the valuation of $283,473,474 shows a return of only 3.1 per cent. (Table 4-A, Appendix, p. 263).

Manifestly the most unfavorable possible result, from the point of view of the plaintiff, would be obtained by assuming the figures asserted by the Transit Commission and the City themselves, and limiting them to company-owned property. While denying that on this record any such rate base may reasonably be considered, it may be illuminating to test the conclusiveness of the plaintiff's case on confiscation by thus considering the figures in their worst possible light. We set forth below in parallel columns the items of company-owned property, the value thereof on the Company's figures, on the figures in the Commission's brief and on the lowest figures asserted in the City's brief therefor:

Property Items	1927 Company's Figures	Commission's Brief Figures	City's Brief Figures
1. Equipment furnished under Contracts 1 and 2	$ 71,378,000	$ 71,378,000	$ 37,000,000
2. Extensions to Elevated under Elevated Certificates	65,338,000	50,387,250	50,734,031
3. Original Elevated Property	143,556,000	70,802,000	50,000,000
4. Materials and Supplies	2,318,517	2,318,517	2,318,517
5. Cash Working Capital	3,087,957	3,087,957	3,087,957
	$285,678,474		
Amount necessary to Recondition	2,205,000		
	$283,473,474	$197,973,724	$143,140,505
Revenue attributable to such property, year ended June 30, 1927	$ 8,864,820	$ 8,864,820	$ 8,864,820
Per cent. of return actually earned on such value	3.1%	4.5%	6.2%

(Table 4-B, Appendix, p. 264.)

It should be said that the figures in the third column, representing the lowest City figures, are on no consistent basis. For instance, the valuation given to the Company property under Contracts Nos. 1 and 2 is not present value but original cost, arbitrarily reduced by an item properly attributable only to present value; and the item of original elevated property is the arbitrary valuation of $50,000,000, reached on the theory that the elevated is obsolete. Even on the Commission's figures the elevated railroads have been arbitrarily reduced 50 per cent. in value.

Notwithstanding the inadmissible basis upon which these figures are reached, the return of $8,864,820, properly attributable in 1927 to the company-owned property, shows a return on the Commission's figures of 4.5 per cent., and even on the City's figures, 6.2 per cent. (Table 4-B, Appendix, p. 264).

(5) The Company's original investment.

Even upon the basis of the Company's original investment, the return is confiscatory. The amount of the investment is $343,842,464 (R. vol. II, pp. 852, 853). The Commission's brief (page 191) has attributed to this investment, not only the whole of the revenue derived in 1927, but the whole augmented by $2,000,000 alleged to be the loss due to the strike of that year. That the strike was preventable,—that it cost such a sum, that it will never occur again, are not asserted. We must deal with the revenue as it was.

There must be deducted the revenue attributable in 1927, to the city-provided property, under Contracts Nos. 1, 2 and 3, thus excluded from the rate base, aggregating, as shown above, $5,234,998. When these have been

deducted, the revenue is found to be $17,387,763 for 1927, which attributed to $343,842,464, is 5 per cent. (Table 5-A, Appendix, p. 265). And even attributing this income to the Commission's determination, asserted in its brief, of the amount of the Company's investment, $287,550,575 (R. vol. II, p. 1178), the return is 6 per cent. (Table 5-B, Appendix, p. 265). The supposed return of 11 per cent., asserted in the Commission's brief, is apparently a typographical or mathematical error. Even applying the entire revenue, augmented by the $2,000,000 attributed to the strike, to the Commission's own figure of the Company's original investment, the result is but 8.4 per cent. (*ibid*, p. 266).

The interlocutory order does not finally adjudicate that seven cents is a proper fare to be charged. It simply enjoins the defendants from interfering with the plaintiff's collection of that fare during the pendency of this action. All questions of the reasonableness of this proposed fare are referred to the Special Master, and the provisions of the order, relating to the two-cent excess, preclude the plaintiff's present use thereof for corporate purposes.

But the Record makes it plain that no fare of less than seven cents could reasonably be held compensatory. The company's combined systems carried in 1926, 1,130,484,647 passengers, and in 1927, 1,173,646,256 passengers (R. vol. II, pp. 802, 803). In round numbers it may therefore be taken that for the present and near future the traffic will approximate 1,200,000,000 passengers annually. A seven-cent fare would therefore produce an approximate increase of $24,000,000 in annual gross passenger revenue.

The Record establishes that with a seven-cent fare there will be increased taxes and also heavier operating expenses, due to the necessity of increasing wages and improving service. The Record establishes that such increased expenses will aggregate at least $7,760,000 annually (R. vol. II, p. 814), so that the actual increase of net revenues due to the seven-cent fare will be less than $17,000,000. If this sum be added to the net operating revenues shown in the calculations set forth above, it will appear that, on any rate base that could properly be established, the return to the Company from such increased fare will still be well below eight per cent. On every possible permissible basis of calculation a five-cent fare is confiscatory and no proper complaint may be made of a seven-cent fare.

The interlocutory relief.

There is no excuse for the attempt of the defendants to create an atmosphere prejudicial to the plaintiff by the pretence that there is no exigency which demands interlocutory relief. The plaintiff is confronted with an extremity. In the language of the Transit Commission's special counsel, "disaster faces it." There exists no avenue of relief save an increase of fare.

The purchasing power of the present five-cent fare is but a fraction of the 1913 basis. Since then wages have increased more than 100 per cent. and the cost of many materials as much; the general level of commodity prices is about 70 per cent. higher (R. vol. II, p. 819). Operating expenses have advanced sharply not only in the aggregate but per car mile (R. vol. II, pp. 1088-1089). The plaintiff is faced with orders of the Commission requiring lengthening of platforms, installation of sig-

nals and furnishing large numbers of additional cars which would entail aggregate capital expenditures of about $40,000,000 (R. vol. II, pp. 811-812). With its present impaired credit it could not market the amount of bonds necessary to finance such expenditures, except at a ruinous discount (R. vol. II, p. 810). It has paid no dividend for ten years.

No relief from these conditions may be expected through increased traffic. The Commission's own records show that passenger traffic on subway lines has already reached the saturation point, to the great discomfort of the traveling public. All the economies effected by the plaintiff—the utmost possible consistent with safety of operation—have not prevented the ratio of operating costs to gross revenue from constantly increasing.

The same pressure of economic conditions has resulted in general increases throughout the country of rapid transit and street railway fares: Chicago 10 cents, Boston 10 cents, Philadelphia 8 cents; and the average of the 272 cities having a population of 25,000 or more, in excess of 8 cents (R. vol. II, pp. 820-821).

Confiscation of the plaintiff's property has long been suffered, and the consequences to the public have been severe. Such actual confiscation has continued until, by the City's claim that all subway revenues in excess of the rental for the old subways and the Company's prior preferentials must be devoted to payment of the deficit in the preferentials due the City, the plaintiff is threatened with receivership, because of actual inability to meet its obligations. But the plaintiff's long endurance of such actual confiscation only makes the necessity for relief the more urgent.

The interlocutory order contains adequate safeguards to protect the public in case the plaintiff should not prevail on the merits. The plaintiff's success would not mean a seven-cent fare, or any other fixed fare, in perpetuity, but only such fare or fares as should be reasonable according to changing economic conditions.

During the pendency of the action the *status quo* may best be preserved by permitting the plaintiff to charge a fare measurably equivalent in purchasing power to the nickel of 1913. And the plaintiff's plight requires immediate relief.

The order appealed from should be affirmed.

Respectfully submitted,

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